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Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1985

CITY OF DES MOINES, IOWA, et al.,
Petitioners,

vs.

DENNIS A. MOORE, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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1831

QUESTIONS PRESENTED FOR REVIEW

1. Whether on the facts of this case the Eighth Circuit decision, sanctioning an award of attorney fees by the district court which:

(a) made no adjustment to the hours submitted to arrive at hours reasonably expended on the lawsuit, and

(b) granted hourly rates well above the market rate in Des Moines, Iowa, and

(c) made no adjustment to the lodestar (hours reasonably expended times a reasonable hourly rate) for the limited success achieved on the merits, and

(d) included hours spent investigating individual claims upon which no success was achieved on the merits,

is so clearly in conflict with this Court's ruling in *Hensley v. Eckerhart,* 461 U.S. 424 (1983) as to call for an exercise of this Court's power of certiorari.

2. Whether the Eighth Circuit's decision in the instant case which:

(a) grants attorney fees for hours expended after rejection of the defendants' offer of consent judgment, and

(b) awards attorney fees for hours expended after defendants formally accepted and approved the Consent Decree proffered by Plaintiffs' counsel, and ultimately accepted by plaintiffs, as the relief they were entitled to,

is in conflict with this Court's ruling in *Marek v. Chesny,* ..... U.S. ....., 105 S.Ct. 3012 (1985).

3. Whether reasonable attorney fees under § 1988 and Title VII may include an award for hours expended for fee counsel hired by two of Plaintiffs' counsel to present their fee applications for the sole purpose of securing an enhanced award.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The City Solicitor and Corporation Counsel, on behalf of the City of Des Moines, Iowa, and the Civil Service Commission of Des Moines, Iowa, as well as all other defendants below, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit concerning attorney fees in this case.

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*The other parties in this case are petitioners Lee Williams, The Fire Department of Des Moines, Iowa, Richard Wilkey, Jerry Thompson, The Civil Service Commission of Des Moines, Iowa, Dolores Monroe, Ralph Costanzo, Marsh Houston, The City Council of Des Moines, Iowa, Peter Crivaro, George E. Flagg, Elaine Szymonika, Tim Urban, Archie Brooks, L. Clarke Priebe, George J. Nahas, The Board of Trustees of the Fire Retirement System for Des Moines, Iowa, Robert Niffeneger, Duane Kirkpatrick, Lee Williams, George Wolfe, Alton Grogh, Ted Lussem, and Dean Johnson, and respondents Gregory B. Perry and the Des Moines, Iowa Branch of NAACP. (All individual petitioners were sued in their official capacities.)

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, A1) is reported at 766 F.2d 343 (8th Cir. 1985). The opinion of the district court (App. B, *infra*, A7) is not reported.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, A25) was entered on June 25, 1985. A petition for rehearing was denied on August 19, 1985 (App. C, *infra*, A27) and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Section 4 of the March 24, 1972 amendments to Title VII, Section 706 of the Civil Rights Act of 1964 (Pub. L. No. 88-352, 78 Stat. 241), Pub. L. No. 92-261, 86 Stat. 104, codified at 42 U.S.C. § 2000e-5(k), provides:

> "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."

2. Section 2 of the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641, codified at 42 U.S.C. § 1988, provides in relevant part:

". . . . In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Acts of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

3. Rule 68 of the Federal Rules of Civil Procedure, dealing with offers of judgment, provides in relevant part:

"At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. . . .

An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. . . ."

STATEMENT

1. This case began when, in response to three civil rights administrative complaints, the City of Des Moines, Iowa elected to address and remedy the obvious lack of black participation in its fire fighter selection and training process. While the City had steadfastly contended it did not discriminate, rather than prove this in a protracted trial (but continue with virtually an all-white fire force), the City actively sought to utilize the complaints to further

the integration of its Fire Department. In so doing, the City made more relief available to Plaintiffs in the Consent Decree than was constitutionally mandated or could have been secured at trial.

Thereafter, Plaintiffs' counsel sought and were awarded § 1988 attorney fees as if the claims of pattern and practice of systematic race discrimination had been fully proven with class-wide backpay, damages, and reinstatement ordered against a recalcitrant public body. No such relief was achieved, yet the Plaintiffs received their full lodestar request as if they had prevailed on the merits of all such claims.

Such an award effectively forecloses public bodies such as the City from daring to extend effective redress to persons such as Plaintiffs who for whatever reason still stand, some twenty years after Congress enacted major civil rights legislation, outside the system.

The linchpin of the Civil Rights Act of 1964 and its 1972 amendments has been voluntary compliance. When attorney fees are awarded without regard for the actual relief extended by a public defendant, such an award thwarts the very actions initiated in furtherance of the Act. In such a case the circuit court must inquire into the abuses charged, lest the bright promise of access offered by Congress through awards of attorney fees be consumed in the fee appetites of counsel. Failing that, this Court must intervene.

2. The facts giving rise to this litigation can be summarized briefly. The administrative complaints of Dennis Moore, Gregory Perry and Jerard Watson alleging intentional racial discrimination in the selection and hiring of fire fighter candidates were filed in late August and

September of 1981. On March 2, 1982 the Civil Service Commission voted to change the scoring of the written and physical agility portions of its fire fighter examination to pass/fail. It also directed its legal counsel to contact the attorney for the administrative complainants (Lovell) to suggest resolution of their complaints through a consent decree. The Commission reasoned that only by the complainants filing federal suit could it avoid the strict state statutory ranking of the Iowa civil service law and reach the minorities heretofore excluded from the fire-fighting force.

The City cooperated with Plaintiffs' counsel to the fullest degree permissible under Iowa law, by opening its files to facilitate the drawing together of an appropriate evidentiary record and by allowing complainants' attorneys (Lovell and Biehler) to assure themselves that the City had not previously undertaken or maintained intentional systematic racial discrimination at odds with its proffered conciliatory and affirmative posture. City and Commission staff compiled and made available historic and statistical data for Plaintiffs' counsel toward that end well in advance of formal discovery.

The Commission conducted its 1982 fire fighter selection process with the expectation that suit would be filed before the selection process began to narrow the field, identify finalists, and rank the top candidates for certification under Chapter 400, Code of Iowa. No effort was made to complete the process before suit. To the contrary, counsel for the administrative complainants was urged to initiate suit while relief in the selection process then underway could be granted.

3. Suit was filed by Moore, Perry and the local NAACP branch on August 24, 1982. Jurisdiction of the

district court over the race discrimiiation claims was invoked under 28 U.S.C. §§ 1331, 1343(3) and (4), Section 706(f)(3) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(f)(3), and Section 124 of the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. § 1244(a), (b).

Upon the filing of the complaint and application for a temporary restraining order, the Commission immediately filed its voluntary consent to a temporary restraining order giving twice the interim relief prayed for by Plaintiffs: certification of one black for every non-black (rather than the one black for every two non-blacks requested by Plaintiffs). Section 400.11, Code of Iowa, requires certification of the top ten applicants with ties for tenth place included. Under the consented-to temporary restraining order, the Commission certified a sublist of five blacks and a sublist of five non-blacks, each sublist ranking the top applicants, with ties for fifth place in the two categories. All appointments from the 1982 lists were made by alternating between the two sublists until each sublist was exhausted.

In late 1982, while the terms of the Consent Decree were being negotiated, Plaintiffs' counsel began filing voluminous formal discovery requests, duplicative of the extensive informal discovery already provided. In early January 1983, a black applicant (Walt Williams), who had failed to achieve sufficient rank among the black candidates to be certified on the 1982 sublist of blacks, filed a race discrimination complaint against the Commission and its 1982 process. Williams was a former DMFD fire fighter of some eleven years tenure before he left the force under indictment on drug charges. After serving a federal prison term related to his guilty plea of mis-

prision of a felony, he sought reemployment as a fire fighter.

In the wake of these events, the City formally offered a Consent Judgment to Plaintiffs in mid-February, 1983. In concise form it not only contained the relief ultimately approved in the Consent Decree but further provided for substantial affirmative duties of the City and the Commission during its selection and recruitment processes which the final Consent Decree does *not* contain. Plaintiffs' counsel not only rejected the form of the City's proposal, insisting upon their own prolix format, but as well ignored the particulars of substantive relief which were offered additional to that which had been previously sought from the City.

Ultimately, negotiations resumed upon the representation of Plaintiffs' counsel to the City and to Judge Vietor that the terms of the Consent Decree, as negotiated by counsel and containing the basic relief agreed upon prior to suit, were an acceptable resolution of Plaintiffs' Complaint. The City Council approved the Consent Decree[1] at its regular meeting of September 6, 1983.. (App. D, *infra*, A42). The City filed its formal approval of the Consent Decree on September 7, 1983 in the district court. (App. D, *infra*, A40). During this same time, although the named individual Plaintiffs approved the decree, the associational Plaintiff refused approval. Lovell and Biehler then sought the assistance of local attorney Robert A. Wright, Sr., long active in branch and national NAACP affairs, to stop the local NAACP president's attempts to prevent settlement of the lawsuit. The National NAACP

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1. A summary of the particular relief contained in the Consent Decree is included in the portion of this Petition dealing with the limited success achieved on the merits. (Pet. for Cert., *infra*, 17-18).

was asked to intercede in the squabble. It was then discovered by Plaintiffs' counsel that the approval and the participation of the General Counsel for the national NAACP (Thomas I. Atkins) should have been secured before the filing of the lawsuit by the local branch, but had to be obtained before the Decree could be approved by the local NAACP branch. (App. D, *infra*, A37-39).

At this stage the New York attorneys, Atkins and his assistant (Ms. Ford), entered the proceedings. Thereafter, counsel for the City, upon the understanding that no relief beyond that made available in the Consent Decree as approved by the City Council could be agreed to, worked with Plaintiffs' counsel and the NAACP attorneys to address the local branch's concern, expressed by Atkins, that Plaintiffs' counsel had agreed to a Consent Decree that did not adequately provide for Walt Williams. (App. D, *infra*, A38). Subsequently, the focus expanded to the local branch president's claims that the City operated a "turnstile" employment process for blacks (City purposely choosing weak candidates so it could dismiss them during probation). The matter was resolved by the parties stipulating to the interpretation to be placed on a few key provisions of the Consent Decree. With the Stipulation[2] in place, the parties then jointly moved for entry of the Consent Decree in mid-December 1983.

4. In the Consent Decree which settled Plaintiffs' race discrimination claims without trial, the City agreed to pay reasonable attorney fees.[3] After the Consent De-

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2. A brief synopsis of the Stipulation is included in the portion of this Petition dealing with this Court's decision in *Marek v. Chesny*, ... U.S. ....., 105 S.Ct. 3012 (1985). (Pet. for Cert., *infra*, 23-24).

3. It should be noted that in his opinion (App. B, *infra*, A7), Judge Vietor corrected the obvious error in the Consent Decree, drafted by Professor Lovell, and in his testimony at the attorney fee hearing wherein he asserted Plaintiffs' counsel, rather than Plaintiffs, were entitled to the fees.

cree became final in late January 1984, application was made by Plaintiffs' counsel for fees and costs totaling just over $463,000 for all 2,156 hours expended by the seven attorneys. (Lovell, Biehler, Wright, Atkins and Ford and two attorneys, Conlin and James, retained by Lovell and Biehler to represent the latter's fee case). Formal settlement efforts undertaken before Chief Judge William Stuart failed. The parties proceeded to the only hearing of any consequence in the whole suit: on the attorney fee issue. Before final submission to the district court, the original askings were pared to $311,599 because the enhancement of 175% originally sought with regard to the hours of Lovell and Biehler was reduced by them at the attorney fee hearing to a 75% multiplier for quality of service and risk of not prevailing.

The District Court, in a memorandum opinion and order dated October 24, 1984, awarded $195,433.59 fees and costs for 2,029 hours. (App. B, *infra*, A15). It found that all of the time expended by seven attorneys was reasonable except for 100 hours related to Lovell's and Biehler's failure to secure the approval of the General Counsel for the NAACP (Atkins) for the local branch to be involved in the litigation. Lovell, Wright and Conlin were awarded $100 per hour as the reasonable prevailing market rate in the relevant community. James was awarded $100 per hour as the maximum prevailing market rate in Des Moines for litigating attorney fees. The Court found the prevailing market rate for the New York based General Counsel of the NAACP (Atkins) in Des Moines (or any place else in the United States) was $200 per hour and that ". . . Ms. Ford's experience and position made it clear that $125 per hour is a reasonable rate for her time."

The City appealed to the Eighth Circuit on the grounds that the award of $195,433.59 fees and costs constituted, on the facts of the case, an abuse of the discretion reposed in the District Court by § 1988 to award reasonable fees to prevailing parties in civil rights litigation. No cross appeal on the denial of any enhancement was filed.

The district court fee award was affirmed by the Eighth Circuit on the City's appeal. (App. A, *infra*, A6). On the facts, the Eighth Circuit refused to find an abuse of discretion by the trial court. In so ruling it took the occasion to admonish all counsel concerning:

> ". . . the large number of cases on our docket alleging an abuse of discretion which are based simply on the amount of an attorney's fee award. . . . Appeal of the district court's fee determination should be taken only where the ditrict court allegedly has misapplied the applicable law." (App. A, *infra*, A5-6).

Because the City believes the decision below sanctions the district court's misapplication of *Hensley v. Eckerhart*, 461 U.S. 424 (1983), certiorari relief is sought in this Court.

REASONS FOR GRANTING PETITION

1. The decision below is in conflict with this Court's decision in Hensley v. Eckerhart, 461 U.S. 424 (1983), on the appropriate attorney fee calculus for plaintiffs who achieve only limited success on the merits of their claims.

Hensley v. Eckerhart, 461 U.S. 424 (1983) arose in the Eighth Circuit and concerned a district court's refusal to eliminate from an award of attorney fees the hours spent on unsuccessful claims. This refusal was

affirmed without opinion by the Eighth Circuit. In vacating and remanding for further proceedings, this Court made it clear in *Hensley* that when the plaintiff achieves only limited success, the district court must award only that amount of fees reasonable in relation to the results obtained. The district court's discretion to award reasonable attorney fees to prevailing parties is abused if fees are awarded on unsuccessful claims or if the fees awarded on successful claims are excessive in relation to the results achieved on such claims. Despite the clear import of the *Hensley* holding, the Eighth Circuit has refused in the instant case to find an abuse of discretion in the district court's award of virtually all hours expended despite Plaintiffs' counsels' over-litigation of the case and their failure to achieve any contested relief on the merits.

In decisions prior to *Hensley* in the Eighth Circuit, attorney fee awards had theretofore been subjected to a vigilant scrutiny to assure that the fees awarded to prevailing parties under § 1988 did not exceed the statutory entitlement: reasonable fees. Indeed, in *Planned Parenthood v. Citizens for Comm. Action*, 558 F.2d 861 (8th Cir. 1977), the Eighth Circuit put the practicing bar and bench on full notice that the expectation in the Circuit was for a just resolution of the fee question—fair to the prevailing plaintiff and fair to the public:

> "We express a caveat on this subject. The prevailing party in a civil rights action is entitled to only 'reasonable' attorney's fees. A party is not entitled needlessly to accumulate exorbitant legal fees with the expectation that the losing party will be called upon to pick up the entire tab. This court will exercise vigilance and pare down needless and unconscionably high legal fees. An award of attorney's fees is compensatory, not punitive, and we will not allow a threat

of paying the opposing party's unreasonable legal fees to chill the assertion or defense of seemingly meritorious civil rights claims." *Id.* at 871.

In the ensuing cases over the next few years, attorney fee requests in the Eighth Circuit were significantly pared down to bring them into conformity with the statutory mandate. *United Handicapped Federation v. Andre*, 622 F.2d 342 (8th Cir. 1980) (reduction of $216,832.35 request for fees and costs to $12,500 total award); *Ladies Center, Nebraska, Inc. v. Thone*, 645 F.2d 645 (8th Cir. 1981) (reduction from one quarter of a million dollars to under $30,000); *Williams v. Trans World Airlines, Inc.*, 600 F.2d 1267 (8th Cir. 1981) (reduction of $40,500 request for fees and costs reduced to $5,000); *Avalon Cinema Corp. v. Thompson*, 689 F.2d 137, 140 (8th Cir. 1982) (excessive hours reduced); *Snyder v. Shearer*, 575 F.Supp. 156 (S.D. Iowa 1983) (50% reduction in requested fees); *Sisco v. J. S. Alberici Construction Co., Inc.*, 564 F.Supp. 765, 767 (E.D. Mo. 1983) (lodestar reduced to 40% of damages recovered for plaintiff with enhancement factor of 50% denied); *McLean v. Arkansas Board of Education*, 723 F.2d 45, 47 (8th Cir. 1983) ($1,171,513.50 fees and $189,892.55 costs request reduced to $357,768.11 total award); and *Monahan v. State of Nebraska*, 575 F.Supp. 132 (D. Neb. 1983) (lodestar reduced to 40% to account for limited success).

In *Jacquette v. Black Hawk County, Iowa*, 710 F.2d 455, 461 (8th Cir. 1983), decided after *Hensley*, the Eighth Circuit characterized the fee requested as egregiously disproportionate to the settlement obtained. It focused upon the result achieved being identical to the *Jacquette* defendant's pre-suit offer. It affirmed the district court's reduction of the attorney fee award and remanded for determination of the reasons for excess expenditure of time by Jacquette's counsel.

The summary disposal of the City's appeal in the instant case by the Eighth Circuit by characterizing it as in good faith but failing to show an abuse of discretion runs directly counter to not only this Court's disposition of *Hensley* but to its own dispositions in the cases cited above and should not be allowed to stand.

(a) The Eighth Circuit sanctioned the district court award of attorney fees in the instant case for the full number of hours expended except for the reduction for failure to seek national NAACP authorization for the local branch to participate in the litigation.

Although Plaintiffs achieved no relief on any contested issue, Plaintiffs' counsel applied for an award of fees for all hours expended on the litigation. The district court eliminated 100 hours for the failure to secure the authorization of the General Counsel for the NAACP for the local branch to be involved in the litigation.[4] No further adjustment was made to arrive at hours reasonably expended on the lawsuit. No hours were eliminated to bring the fees into line with Plaintiffs' limited achievement on the merits.

The initial estimate of a reasonable attorney's fee is calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate. *Hensley v. Eckerhart*, 461 U.S. 424 (1983). The district court should exclude from this calculation hours that appear to have served no further purpose for the suit.

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4. The NAACP Plaintiffs' stated need to involve national counsel was a result of long-established policy of the NAACP infrastructure (App. D, *infra*, A37), and in no wise was necessary to obtain competent representation on the merits in the relevant community. The hours expended in maintenance of this practice may not be shifted to defendants under § 1988.

Hours not properly billed to one's client are not properly billed to one's adversary pursuant to statutory authority. *Id.* at 434, citing to *Copeland v. Marshall*, 205 U.S. App. D.C. 390, 401, 641 F.2d 880, 891 (1980) (en banc). It was Plaintiffs' counsel who elected to approach this case in a textbook fashion replete with intensive, erudite (albeit unproductive) discovery forays through public records. Many of the hours claimed relate to these exhaustive hours of abortive discovery.

It must likewise be noted that, by the time the Civil Service Commission suggested a consent decree resolution of the administrative complaints, there had been a number of fire department litigations resolved in the previous decade available as prototypes for settlement by consent decree. *Carter v. Gallagher*, 425 F.2d 315 (8th Cir. 1971); *Boston Chapter NAACP, Inc. v. Beecher*, 371 F.Supp. 507 (D. Mass.), 504 F.2d 1017 (1st Cir. 1974), 423 F.Supp. 696 (D. Mass 1976); *Davis v. County of Los Angeles*, 566 F.2d 1334 (9th Cir. 1978); *Firefighters Institute for Racial Equality v. City of St. Louis*, 410 F.Supp. 948 (E.D. Mo.), 418 F.Supp. 383 (E.D. Mo.), 549 F.2d 506 (8th Cir. 1977); *Friend v. Leidinger*, 446 F.Supp. 361 (E.D. Va. 1977); *United States v. City of Chicago*, 573 F.2d 416 (7th Cir. 1978); *Neely v. City of Grenada*, 438 F.Supp. 390 (D. Miss. 1977); *Drayton v. City of St. Petersburg*, 477 F.Supp. 846 (M.D. Fla. 1979); *Ramirez v. The City of Omaha*, 538 F. Supp. 7 (D. Neb. 1981); *Wilmore v. City of Wilmington*, 533 F.Supp. 844 (D. Del. 1983); *Stotts v. Memphis Fire Department*, 679 F.2d 541 (6th Cir. 1982); and *Van Aken v. Young*, 541 F.Supp. 448 (E.D. Mich. 1982).

These cases—and most particularly the *United States v. City of Alexandria*, 614 F.2d 1358 (5th Cir. 1980), decision with its consent decree included as an appendix to the reported decision—were utilized in the instant case.

Lovell and Biehler were clearly not on the cutting edge in fashioning the Des Moines decree and had in fact been preceded by many others. The hours claimed with regard to research and writing should have been pared to remove those "reinvention of the wheel" hours not billable to the Plaintiffs in this action. This Court, in *Maher v. Gagne*, 448 U.S. 122 (1980), affirmed the disallowance of half the hours claimed in a civil rights case where the issues were relatively simple and most attorneys would not have spent so much time on the case.

Contrary to the *Maher* precedent and its own earlier decisions, the Eighth Circuit has refused in this relatively simple case to deny fees for its overpreparation. *See Premachandra v. Mitts*, 727 P.2d 717, 733 (8th Cir. 1984); *Brown v. Bathke*, 588 F.2d 634, 638 (8th Cir. 1978).

(b) The Eighth Circuit sanctioned the district court award of hourly rates well above the market rate in Des Moines, Iowa during the period from August 1982 to late January 1984 when the suit was filed and the negotiations culminating in settlement occurred.

The Plaintiffs' counsel are contractually entitled to whatever fees they and Plaintiffs have agreed upon for whatever tasks they were commissioned to undertake. However, the duty of the district court in deciding what fees to shift to defendants in a § 1988 award is to arrive at that amount necessary to attract competent counsel without producing windfalls to the attorneys involved. *Avalon Cinema Corporation v. Thompson*, 689 F.2d 137 (8th Cir. 1982). In general, under *Avalon*, a reasonable hourly rate is the hourly amount to which attorneys within the area where the case is tried would typically be entitled for a given type of work. *Id.* at 140.

Under *Hensley v. Eckerhart*, 461 U.S. 424 (1983) and *Blum v. Stensen*, ... U.S. ....., 104 S.Ct. 1541 (1984), reasonable fees under § 1988 are to be calculated according to prevailing market rates in the relevant community. The hourly rates awarded for all attorneys (except Biehler) are in excess of market rate.

(c) The Eighth Circuit sanctioned an award of attorney fees which made no adjustment for the limited success achieved on the merits.

Congress has not authorized an award of fees simply because it was reasonable for a plaintiff to bring a lawsuit, or to credit conscientious counsel who pursue a case with devotion and skill. The critical factor is the degree of success obtained. A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole. *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

After arriving at the lodestar (hours reasonably expended in the litigation as a whole times a reasonable hourly rate) the district court must review the product to be certain that such amount is not excessive. *Id.* at 434. In line with *Hensley*, in *Snyder v. Shearer*, 575 F. Supp. 156, 159 (S.D. Iowa 1983) the district court reduced the lodestar by 50% because it did not feel all efforts billed were reasonably necessary to secure the relief obtained from the public body defendant.

The expenditure of 1779.2 hours by attorneys Lovell and Biehler to achieve relief which was essentially that presented to and agreed upon before the commencement of suit, and in significant measure implemented just after, is excessive and should have been substantially reduced by the Eighth Circuit to arrive at a number of hours rea-

sonably expended upon the lawsuit. *Hensley*, 461 U.S. 424 (1983). The number of attorney hours awarded for Lovell and Biehler equals approximately one and one-third (1 1/3) years of attorney time under the *Ladies Center, Nebraska, Inc. v. Thone*, 643 F.2d 645, 647 (8th Cir. 1981) formula of 1500 billable hours per year.

As hereinabove stated, after the filing of the administrative complaints the City approached Plaintiffs' attorney (Lovell) and suggested that in view of Iowa Civil Service law, the number of blacks in the DMFD could only be increased to an appropriate ratio within the near future by the filing of a federal action to be settled thereafter by a consent decree. It was understood from the beginning that the City's goal, toward which Plaintiffs actively participated, was to avoid the strict state civil service laws governing selection, ranking and appointment of fire fighter candidates, which appeared to impede the integration of the fire force.

The actual relief achieved by Plaintiffs was: 1) a continuation of the 1982 Firefighter Selection Process (one-for-one selection) agreed upon and in place by the fall of 1982; 2) the awarding of an immediate position, with retroactive seniority, to the only black person (Dennis Moore) who had not been certified after Title VII became applicable to public bodies and prior to the entry of the Consent Decree but whose performance during a selection process, if graded on the 1982 pass-fail basis, would have resulted in certification; 3) the awarding of expedited hearings to the two former DMFD black fire fighters (Walt Williams and Jerard Watson) with pending EEOC charges; and 4) an open period for application or re-application of any black who claimed the perception of the DMFD as racist had prevented application or con-

tinuation in a selection process. (Not a single such member of Plaintiffs' class came forward to avail themselves of this relief under the Consent Decree).

Despite Plaintiffs' counsels' protracted search for evidence of race discrimination, Plaintiffs accepted a Consent Decree awarding them *no* success whatsoever upon any of the contested issues: damages, backpay, determination that the written examination was violative of Title VII and enjoining of its use, and suspension and termination of all revenue sharing funds with an order to the City to repay funds already received.

Ultimately Atkins, General Counsel for the national NAACP, described as the key provision of the Consent Decree that which dictated the appointment of blacks to the Des Moines Fire Department on a one-for-one basis until the appropriate black/non-black ratio is reached. In addition to the "key" relief, which was never in dispute, the Plaintiffs' complaint asked for a preliminary injunction with regard to the 1982 selection process to require certification of one black for every two non-blacks. The Civil Service Commission readily agreed to the injunction but accelerated the process by insisting upon a one-for-one certification.

No new ground was broken in this case. As Atkins aptly deposed to fee counsel, it was ". . . just another car on a train that was going down the track." The City could not have forced Plaintiffs to accept the Consent Decree; Plaintiffs were entirely at liberty to proceed to trial on any and all evidence they had of intentional racial discrimination or the appearance thereof. They declined to do so. They accepted the limited relief offered by the Consent Decree; they must accordingly accept a limited attorney fee.

(d) The Eighth Circuit sanctioned a clear contravention of the statutory grant of authority to the district judge to allow prevailing Plaintiffs to receive attorney fees, by awarding fees for investigation of individual claims upon which no success on the merits had been achieved.

Although the City urged that hours associated with the Walt Williams and Jerard Watson claims were compensable to Plaintiffs under § 1988 only if, and when, either or both prevailed upon some portion of the merits of their claims, these hours were included by the district court in the award. The Eighth Circuit refused to find that the trial court abused its discretion in making such an award.

At the time of the attorney fee award these two claims were pending before the Court awaiting the expedited hearings provided for in the Consent Decree. No judicial determination of the merits of the claims had been made. To request and be awarded fees for these unresolved claims assumed success on the merits. There is no such presumption in § 1988 fee awards. The statute allows fees to be shifted to defendants *only* after plaintiffs satisfy the threshold requirement of winning some relief upon their claims. *Nadeau v. Helgemoe*, 581 F.2d 275, 278-279 (1st Cir. 1978). Neither Williams nor Watson had yet achieved the status of a prevailing party on his claim when hours expended investigating both claims were awarded to Plaintiffs. After trial, the claims of each were dismissed by the district court for a complete lack of evidence to support the charges of discrimination. (App. B, *infra*, A19-20 and A24).

In *White v. City of Richmond*, 559 F.Supp. 127 (N.D. Cal. 1982), involving three separate consent decrees and claims of twenty-seven individual plaintiffs, the district

court refused to award hours spent pursuing individual damage awards, ruling those hours would be compensated, if appropriate, only after decision on the merits of each. The *White* court ruled these hours were not to be compensated until the plaintiffs prevailed on the merits. This is precisely the argument raised unsuccessfully by the City, first before Judge Vietor and then before the Eighth Circuit. The circuit court dismissed the City's objections with citation to *Hensley v. Eckerhart*, 461 U.S. 424 (1983): "much of counsel's time was devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis." *Id.* at 435. The City submits that under *Hensley* Plaintiffs' counsels' duty, in making application to shift attorney fees as costs under § 1988 to Defendants, is to maintain and submit billing time records in a manner which enables a reviewing court to identify time spent on distinct claims. If Plaintiffs' counsel do not do so, it is they who should suffer the consequences of a reduced amount. If they do not do so, the district court has no authority to shift such fees, since it can award only those fees reasonably necessary to achieve the success obtained. Here, the Eighth Circuit has reversed the calculus and allowed the district court, because of the claimed difficulty of categorizing of time, to presume success.

The abuse within any such presumption is nowhere clearer than in the instant case. In the subsequent trials on the merits, both Watson and Williams failed to secure any relief whatsoever. (App. B, *infra*, A20 and A24, respectively). In fact, Judge Vietor found a complete lack of any evidence to support either of their claims. (*Id.* A19 and A24, respectively). After a full trial on the merits for each complainant, Judge Vietor dismissed each complaint and entered judgment in favor of the City, Where,

on this record, is the success on the merits necessary to bring any of the Watson or Williams hours across the *Nadeau* threshold?

2. The decision below is in conflict with this Court's ruling in Marek v. Chesny, ... U.S. ....., 105 S.Ct. 3012 (1985).

The Eighth Circuit gave the City's citation to *Marek v. Chesny*, ... U.S. ....., 105 S.Ct. 3012 (1985) short shrift. In fact, it gave no indication of any consideration of *Marek* at all in its denial of the City's Petition for Rehearing En Banc. (App. C, *infra*, A27). The City has consistently urged that reasonable attorney fees under § 1988 do not include hours incurred after its settlement offer of the Consent Judgment of February 14, 1983 (App. D, *infra*, A28-29) or, alternatively, after its formal approval of the Consent Decree was filed with the district court on September 7, 1983. (App. D, *infra*, A40).

Fed. Rule Civ. Proc. 68 provides that, if a timely pretrial offer of settlement is not accepted and the judgment finally obtained is not more favorable than the offer, the offeree must pay the costs incurred after the offer is made. In *Marek*, this Court ruled that the plain language of Rule 68 and § 1988 subjects attorney fees awarded as costs pursuant to § 1988 to the cost shifting provision of Rule 68.

(a) The Eighth Circuit sanctioned an award of attorney fees for hours expended after Plaintiffs' rejection of the City's offer of consent judgment.

On February 14, 1983 the City served notice upon Lovell and Biehler of its willingness to enter into a Consent to Judgment in the suit. (App. D, *infra*, A28-29). Plaintiffs failed to achieve a more favorable judgment in the Consent Decree entered. Rule 68 precludes the shifting under

§ 1988 of costs incurred by Plaintiffs for attorney fees subsequent to the City's offer. In subjecting offers which include § 1988 attorney fee awards to the application of Rule 68, in *Marek v. Chesny*, ... U.S. ....., 105 S.Ct. 3012 (1985), this Court ruled that where the ultimate recovery for a plaintiff does not exceed the rejected settlement offer, the plaintiff, although technically the prevailing party, has not received any benefits from the post-offer services of his attorney. This Court then proceeded to hold the *Marek* petitioners not liable for $139,692 in post-offer legal services.

(b) The Eighth Circuit sanctioned an award of attorney fees for hours expended after Defendants formally accepted and approved the Consent Decree proffered by Plaintiffs' counsel.

A substantial portion of the total hours sought related to the period of time *after* the City approved the Consent Decree and Plaintiffs' attorneys Lovell and Biehler found themselves unable to obtain or deliver their associational client's approval.[5] The City did not cause the expenditure of these hours. The time spent did not produce greater relief; there is no basis, therefore, to shift such fees to the City.

To recount, by August, 1983, once the attorneys for all parties and the District Court had agreed on the terms of the Consent Decree, the Defendants promptly accepted it and filed their binding formal approval with the court. (App. D, *infra*, A40). However, the approval of the

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5. In certifying the class Judge Vietor noted a potential standing challenge to the local NAACP branch's presence in the suit and observed the City had not challenged its presence. Since this suit was in a very real sense the negotiation, drafting, and execution of a contract between the black community and the City for the integration of the DMFD, a local branch's participation was accepted by the City without objection.

NAACP Plaintiff was not forthcoming, and three additional lawyers—Atkins, Ford and Wright—were drawn into the litigation to resolve the NAACP Plaintiff's internal conflicts and disagreements.

At the point in time when the City approved the Consent Decree and assumed responsibility for reasonable attorney fees, Plaintiffs were represented by Lovell and Biehler. The Consent Decree form approved by the City Council included signatory lines for the Judge, the City Solicitor, Corporation Counsel, and Lovell and Biehler. (App. D, *infra*, A83). After the City had filed its formal approval of the Consent Decree in Court and until the litigation was finally terminated, the Plaintiffs increased their representation from two to five lawyers working on the associational Plaintiff's internal conflicts and thereafter added two more for the fee application. The City did not produce the circumstances necessitating such an amplification in Plaintiffs' representation.

After the City's approval of the Consent Decree, the two City attorneys worked with all counsel appearing on behalf of Plaintiffs to secure, within the parameters of the already approved Consent Decree, written specifics for the City practices under Paragraphs 19, 20 and 26 of the Decree. The City held to the decree despite political pressure to fall back and despite NAACP pressure to reopen negotiations. Instead, the City offered to stipulate to the interpretation of the decree by those drafting and consenting to it. The City would: 1) not count in its annual compliance report any person who has failed to complete probation during the reporting year; 2) in reporting its compliance; tally all vacancies filled during the year and report whether at least 50% had been filled by blacks; 3) at the end of any reporting period in which fewer than fifty percent (50%) of all vacancies filled or

net appointments made had been of blacks apply to the Court for direction before filling further vacancies, making further appointments or starting a new selection process; 4) provide to Plaintiffs at end of each selection process all information necessary to determine net cumulative appointments during the life of consent decree; and 5) make full report to the Court of any black appointee leaving drill school or failing to complete drill school. When it was apparent such stipulation was the most which could be secured from the City short of further litigation, the associational Plaintiff consented and the decree was finalized.

It was an abuse of discretion to order the hours expended by Plaintiffs' counsel after the City's acceptance and approval of the Consent Decree to be shifted under § 1988 to the City for payment.

3. The decision below sanctioned the shift to Defendants in a § 1988 and Title VII attorney fee award the litigious hours expended by fee counsel otherwise strangers to the litigation who presented the application for Lovell's and Biehler's fees only and raised no claim as to Plaintiffs' entitlement to fees for NAACP attorneys Wright, Atkins and Ford.

The Attorney Fees Act contemplates that the determination of reasonable attorney fees to be shifted to civil rights defendants should be handled by the filing of a motion by the attorneys involved and that great reliance should be placed by the attorney for each party on the knowledge, experience, expertise and familiarity with the case possessed by the trial court. In accord with the Congressional view, this Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), pointedly admonished the practicing bar and bench that the attorney fee application should not

become the source of the second major litigation in the suit.

In the instant case, the fee issues were simple. There was no necessity to hire separate fee counsel to litigate the fee matter. Certainly it was not necessary to hire two fee attorneys. There was no question that the Plaintiffs were prevailing parties, entitled to attorney fees. The issues were the hourly rate to be applied and the reasonableness of the hours of work expended when considered in light of the subject matter of the litigation and the results obtained. In such circumstances, the employment of additional fee counsel charged with the sole purpose of enhancing the fee award resulted in the very litigiousness proscribed by *Hensley*.

To wit, the only hearing of any consequence in this case concerned fees. No fewer than twenty-two (22) attorneys appeared by affidavit, deposition and in-court testimony on behalf of the Lovell and Biehler applications. Their testimony was couched in broad, generic language concerning § 1988 attorney fees and excited language concerning the complexity of the case, all studiously directed toward raising the fees. None demonstrated any awareness that, despite the claims of intentional racist behavior, Plaintiffs had agreed to a settlement with absolutely no backpay, in which not a single class Plaintiff stepped forward to claim relief, and the City was left to proceed as agreed upon before suit was filed, with the one-for-one certification and hiring which it had actively sought. With but rare exception, each of the 22 attorney witnesses shared a common status: a direct pecuniary self-interest in the hourly rate of attorney fees to be awarded under § 1988 against public defendants in this district. The fee attorneys themselves expended a total of 150 hours of work. Deducting eight hours for the one-day hearing, this leaves 142

hours or 23 six-hour days to prepare for the hearing. The Defendants submit that 23 days preparing for a one-day hearing on attorney fees is litigiousness in its most abusive form. Even more is this true since fee counsel, hired directly by Lovell and Biehler, undertook no representation on the Atkins, Wright and Ford applications.

The record in this case shows the complete refusal of the Plaintiffs to avoid, and the lower courts to control, the prohibited second major litigation over § 1988 fees. For Defendants to avoid such litigation, the Defendants would have to accede to unconscionable fee demands without murmur. Neither justice nor the public weal demand that public funds be so cavalierly donated. The City does not challenge the preligitation determination by Plaintiffs' counsel to proceed across a broad front in search of proscribed, discriminatory past or present conduct by one or all Defendants. Such an all-encompassing search is entirely proper by any plaintiff raising a claim against the City. In fact, it routinely occurs in a substantial portion of the litigation filed against the City. What is improper is the shift of the attorney fees for the hours expended in such attack when it fails to produce proof which Plaintiffs believe can be urged as the basis for relief additional to that proffered by the City. Despite that failure—or perhaps because of it—the fee advocates were retained for the singular purpose of pressing for *all* hours expended by Lovell and Biehler.

The City respectfully submits that Congress did not intend to shift, as reasonable fees under § 1988, fees for attorneys who are strangers to the suit, who enter the fray after a plaintiff's relief has been achieved for the sole purpose of enhancing and enlarging a plaintiff's § 1988 award of fees. It was never intended that a major production be made of the fee question. When Plaintiffs'

counsel elect to orchestrate their presentation in such a fashion, Defendants should not be required to pay for the litigation thereby engendered.

With regard to fees for collecting fees, the Court in *Lund v. Afleck*, 587 F.2d 75, 77 (1st Cir. 1978) stated:

> ". . . if the attorney's initial claims are exorbitant or the time spent advancing them unreasonable, the district court should refuse the further compensation. The same point we have emphasized in all fee situations applies here: It is not enough for the court to multiply a fixed rate by the number of hours claimed. The court must satisfy itself of the overall fairness and reasonableness of the fee under all circumstances. . . ."

The City submitted, first to the district court and then to the Eighth Circuit, without success, that the *Lund* decision was clear authority for the district court to completely deny a claim of attorney fees for collecting attorney fees if it found that the City was justified in litigating the question. This Court's decision in *Hensley* would appear to support such result. Initially, attorney Lovell claimed fees of $277,942.50; attorney Biehler claimed fees totaling $126,802. On July 5, the day before the hearing was held on the fee dispute, Lovell reduced his claim to $176,872 and Biehler reduced his claim to $80,692.50. On July 13, Lovell further reduced his claim to $173,285 and Biehler reduced his claim to $78,057. Unquestionably, the City's refusal to capitulate to the fee demands thrust it into litigation on the question. However, the City's resistance resulted in a reduction of $153,402 before the matter was even submitted for decision and another reduction of $116,165 by Judge Vietor when he announced his decision. These figures appear as positive evidence that the initial claims were exorbitant and that the City was justi-

fied in resisting such claims. However, overreaching for exorbitant attorney fees is not ameliorated where their excessiveness is only somewhat diminished rather than eliminated.

The district court should have denied completely the claim made for fee expense incurred. In its abdication, the Eighth Circuit should have acted. This is so because the tools of avoidance do *not* belong to the defendants in attorney fee cases; rather they are in the hands of plaintiffs' counsel, wielded (as here) indiscriminately unless the District Court demands otherwise. In the instant case, the two fee attorneys were joined by twenty-two attorney witnesses to present the application of Plaintiffs' counsel, who themselves were joined by three NAACP attorneys to secure relief which the City offered without contest before, during and after the main suit. There was no need to have twenty-nine attorneys do that which either did not need to be done or could have been done deftly by the one and, certainly, by two attorneys.

CONCLUSION

The City could have won this suit—witness the Williams and Watson findings. It elected, however, to get on with integrating its Fire Department. For such choice it has been ordered to pay attorney fees to seven lawyers. There was no need for such lawyering. Without that need there is no basis to shift the hours they expended to the City under the guise of a § 1988 award to Plaintiffs.

If the district court does not accept responsibility for close scrutiny and analysis of such § 1988 applications—relying upon the Eighth Circuit's direction in this case that "district courts should not become the inevitable haven for adversary proceedings concerning attorney fees"—it bodes

ill for target defendants such as the City. So long as the litigiousness outlined above is tolerated by district courts, fee claims will be sought and granted out of all proportion to the worth of the suit. The City has no choice but to submit that such overreaching can only be described as an abuse of discretion.

The City urges that it is wrong to order public bodies to submit to the intransigence of plaintiffs' counsels' fee appetite, allowed unabated, in the district courts. To ignore the facts of this case and summarily affirm as did the Eighth Circuit is to brush aside the urgent and compelling public interest in identifying and preventing windfall attorney fee awards and the parallel public interest in early and effective resolution of claims of discrimination by public bodies.

At a crucial point early in this litigation, Judge Vietor cautioned Plaintiffs' counsel that civil rights litigants usually gain more relief in a consent decree with a public body than the Constitution could offer. If fee awards such as the instant one are allowed to stand, the potential for such relief cannot but be extinguished. Public bodies will have to shift their attention and strapped resources to aggressive defense against discrimination complaints. Once again, the losers will be those standing on the outside looking in.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 84-2514

Dennis A. Moore, and Gregory B. Perry, Individually and on behalf of all others similarly situated; Des Moines, Iowa Branch of the NAACP, as an organization and on behalf of its members and all others similarly situated,
Appellees,

v.

City of Des Moines, Iowa; Lee Williams, The Des Moines, Iowa Fire Dept.; Richard Wilkey; Jerry Thompson; The Des Moines Civil Service Commission; Delores Monroe, Ralph Costanzo; Marsh Houston; R.V. Sipfle; The City Council for the City of Des Moines; Peter Crivaro; George E. Flagg; Elaine Szymoniak; Tim Urban; Archie Brooks; L. Clarke Priebe; George J. Nahas; The Board of Trustees of the Fire Retirement System for Des Moines, Iowa; Robert Niffeneger; Duane Kirkpatrick; Lee Williams; George Wolfe, Alton Grogh; Ted Lussem; and Dean Johnson,
Appellants.

Appeal From the United States District Court for the Southern District of Iowa.

Submitted: May 16, 1985

Filed: June 25, 1985

Before LAY, Chief Judge, ARNOLD, Circuit Judge, and REGAN,* District Judge.

LAY, Chief Judge.

The plaintiffs brought a class action suit against the City of Des Moines alleging racially discriminatory practices and standards in the employment of firefighting personnel. After substantial discovery and long negotiations, the parties entered a consent decree affording significant affirmative relief to the plaintiffs. The City of Des Moines now appeals an award of attorneys' fees and expenses against it totalling $195,433.59 plus interest pursuant to 42 U.S.C. § 1988 (1982).

The consent decree provided the City would pay "reasonable attorneys' fees." The parties were unable to agree on a fee amount, and an evidentiary hearing was held. In calculating the proper amount of attorneys' fees to be paid by the City, the district court[1] found:

> This case was difficult and complex civil rights class action litigation. It necessarily required the expenditure of a great deal of time by plaintiffs' lawyers, and under the circumstances of the case several lawyers were necessary. (Footnote omitted).
>
> * * *
>
> Under all of the circumstances, involvement of each lawyer was reasonably necessary. Each not only played a vital role, but each performed ably. The result is a detailed consent decree that is a very pro-

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*The HONORABLE JOHN K. REGAN, Senior United States District Judge for the Eastern District of Missouri, sitting by designation.

1. The Honorable Harold D. Vietor, United States District Judge for the Southern District of Iowa.

fessional work product reflecting a high level of skill in the field of complex civil rights litigation.

* * *

[With the exception of 100 hours] all of the time expended by all of plaintiffs' lawyers, although extensive, was reasonable * * *.

* * *

The experience and abilities of each [attorney] justify the hourly rate each seeks.

The City has raised numerous issues on appeal, including:

I. Whether the trial court in determining hours reasonably expended considered the number of hours ordinarily necessary competently to prepare comparable cases?

II. Whether plaintiffs can be awarded fees for hours expended upon claims of individual class members who await expedited hearing and have not yet prevailed upon the merits of their claims?

III. Whether the hourly rates granted by the trial court are the prevailing market rates in the relevant community?

IV. Whether the plaintiffs achieved a level of success that makes the hours reasonably expended times a reasonable hourly rate a satisfactory basis for the fee award?

V. Whether the district court's downward adjustment went far enough?

VI. Whether fees should be awarded for preparation and prosecution of an application seeking excessive attorney fees?

VII. Whether an award of fees may be granted which substantially penalizes public body defendants

so as to chill their offering of gratuitous relief to civil rights complainants?

VIII. Whether a request for fees for consent decree administration can be granted without any evidence of the parties attempting to settle the amount of such fees as required by the consent decree?

With the exception of issue II, the questions the City raises are factual and require appellate supervision only if the district court has abused its discretion. We find no such abuse in this case.[2]

Under this court's supervisory power, we feel it necessary to address the appropriateness of appeals of attorneys' fees awards that contend the district court has abused its discretion. The legal issues and standards surrounding an award of attorneys' fees are becoming well established. *See, e.g., Blum v. Stenson,* 104 S. Ct. 1541 (1984); *Hensley v. Eckerhart,* 103 S. Ct. 1933 (1983); *Craik v. Minnesota State University Board,* 738 F.2d 348 (8th Cir. 1984); *Avalon Cinema Corp. v. Thompson,* 689 F.2d 137 (8th Cir. 1982). The district court in this case has demonstrated an excellent grasp of these issues and standards. The award of attorneys' fees may be substantial; the cost to the losing party of paying the attorneys' fees can be greater than the cost of paying the judgment awarded on the merits. The factual resolution of attorneys' fees cases, however, is "peculiarly within the competence of the district courts, which are intimately familiar

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2. In issue II, the City asserts the district court erred in awarding fees for hours spent investigating the claims of two class members who decided to pursue individual remedies, and who had not yet received a hearing and become prevailing plaintiffs. We agree with the plaintiffs, however, that "[m]uch of counsel's time [was] devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis." *Hensley v. Eckerhart,* 461 U.S. 424, 435 (1983).

with their respective bars." *Robert M. v. Benton*, 671 F.2d 1104, 1107 (8th Cir. 1982). The trial judge has a special understanding of the degree of complexity of the issues, and a unique ability to evaluate first hand the competence of the attorneys. Because of its singular viewpoint, the district court is best equipped to determine whether hours were reasonably expended, whether the attorneys' hourly rates are within the general rates charged for a particular service in the relevant community, whether the prevailing party achieved a level of success justifying the hours spent, and whether the risk of the case not prevailing calls for an enhancement of the lodestar fee. *See generally Avalon Cinema Corp. v. Thompson*, 689 F.2d 137 (8th Cir. 1982); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). The appellate court's lack of knowledge concerning local fees and practices renders necessary the district court's wide discretion in the award of attorneys' fees. A successful appeal lies only where the district court has abused its legal discretion or has erred in its understanding of the governing legal standards.

Our concern centers on the large number of cases on our docket alleging an abuse of the district court's discretion which are based simply on the amount of an attorneys' fee award. Such appeals often lack substance and hinder the prompt disposition of more meritorious appeals. The dockets of all federal courts are overcrowded. We suggest to the bar and to individual counsel that as officers of the court, lawyers have a responsibility in limiting litigation over attorneys' fees. Most fee cases can be processed through amicable negotiation and agreement; the district courts should not become the inevitable haven for adversary proceedings concerning attorneys' fees.

Good faith negotiations do not always achieve a resolution satisfactory to all parties, and we do not criticize

suits based on fee claims that cannot be resolved through mediation efforts. Appeal of the district court's fee determination should be taken only where the district court allegedly has misapplied the applicable laws. Appeals contending that the district court abused its discretion in determining the amount awarded ordinarily do not require oral argument and will be decided without argument by a three-judge screening panel. If the court holds an appeal is frivolous and not brought in good faith, the court may properly exercise sanctions relating to costs and attorneys' fees. *Cf. Eastway Construction Corp. v. City of New York,* Nos. 84-7752, 84-7786, slip op. at 3973-74 (2d Cir. May 21, 1985) (holding Fed. R. Civ. P. 11 requires sanctions against "an attorney and/or his client when it appears that a pleading has been interposed for any improper purpose, *or where,* after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.") (emphasis in original).

In the present case we hold that although the City's appeal is in good faith, the City has failed to show the district court abused its discretion. We thus affirm the judgment of the district court. Court costs are to be paid by the City; the plaintiffs are requested to submit affidavits concerning the amount of costs and attorneys' fees incurred on appeal. Judgment affirmed.

So ordered.

A true copy.

(Seal)

/s/ Robert D. St. Vrain

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

(Filed October 24, 1984)

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CIVIL NO. 82-460-D

DENNIS A. MOORE, et al.,
Plaintiffs,

v.

CITY OF DES MOINES, IOWA, et al.,
Defendants.

MEMORANDUM OPINION AND ORDER ALLOWING ATTORNEYS' FEES

Plaintiffs, who are the prevailing parties and entitled to reasonable attorneys' fees as part of the costs, expenses and disbursements to be paid by the defendant City (consent decree, paragraphs 32 and 33), now seek allowance of attorneys' fees under and pursuant to the Civil Rights Attorney Fees Award Act of 1976, 42 U.S.C. § 1988, and other applicable civil rights fee-shifting statutes.

Plaintiffs seek much higher attorneys' fees than the City believes should be allowed. In dispute are the reasonableness of the time expended, the reasonableness of some of the hourly rates sought, and the appropriateness of enhancing the fee award by a "multiplier" for risk, or contingency, and quality of representation. Defendants also challenge the fees requested for work of new counsel, Mr. James and Ms. Conlin, in respect to the fees award litigation.

General Legal Principles

The statutes provide for "reasonable" fees. The purpose of the statutes "is to ensure 'effective access to the judicial process' for persons with civil rights grievances. H.R. Rep. No. 94-1558, p. 1 (1976)." *Hensley v. Eckerhart,* ..... U.S. ....., 103 S. Ct. 1933, 1937 (1983). "The amount of the fee, of course, must be determined on the facts of each case." *Id.*

Normally a reasonable fee will be established by multiplying the time reasonably expended by "the prevailing market rates in the relevant community," and an upward adjustment of the fee will be appropriate only in "the rare case." *Blum v. Stenson,* ..... U.S. ....., 104 S. Ct. 1541, 1547, 1550 n.18 (1984). However, in some cases an upward adjustment based on the risk of not prevailing in the case and thereby recovering no fees is appropriate. *Craik v. Minnesota State University Bd.,* 738 F.2d 348, 350 (8th Cir. 1984). *But see Laffey v. Northwest Airlines, Inc.,* ..... F.2d ....., 53 U.S.L.W. 2181 (D.C. Cir. Sept. 28, 1984). (The question was left open in *Blum v. Stenson, supra,* 104 S.Ct. at 1550 n.17. Justices Brennan and Marshall separately concurred in order to express their opinion that fees could be enhanced for the risk of not prevailing. *Id.* at 1550-51.)

Blum v. Stenson, supra, holds that quality of representation "generally is reflected in the reasonable hourly rate," and is a basis for upward adjustment only in rare cases. *Id.* at 1549.

When out-of-town counsel is the fee applicant, the relevant community, the prevailing rates of which must be used, is usually the one in which the case is litigated rather than the one in which the lawyer resides. *Avalon Cinema Corp. v. Thompson,* 689 F.2d 137, 140 (8th Cir.

1982); *Donnell v. United States*, 682 F.2d 240, 251 (D.C. Cir. 1982). Circumstances sometimes justify an out-of-town rate. *Maceira v. Pagan*, 698 F.2d 38, 40 (1st Cir. 1983); *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760, 768-69 (7th Cir. 1982).

Fees are allowable for time reasonably spent in establishing the fee application. *Jones v. MacMillan Bloedel Containers, Inc.*, 685 F.2d 236, 239 (8th Cir. 1982).

This Case

This case was difficult and complex civil rights class action litigation.[1] It necessarily required the expenditure of a great deal of time by plaintiffs' lawyers, and under the circumstances of the case several lawyers were necessary. Mr. Lovell and Mr. Biehler commenced the suit and litigated it to its final settlement conclusion. In August of 1983, when a potential settlement appeared doomed by lack of support among the plaintiff class, Mr. Wright, a local attorney active as counsel for the plaintiff Des Moines, Iowa, Branch of the NAACP, and Mr. Atkins, general counsel of the NAACP, and Ms. Ford, assistant general counsel of the NAACP, became co-counsel for plaintiffs. Mr. James and Ms. Conlin litigated the attorneys' fee issue for plaintiffs.

Mr. Atkins, Ms. Ford and Mr. Wright played vital roles in working out some final snags in the proposed settlement agreement and in bringing about the degree of unity within the plaintiff class that was a requisite to achieving approval by plaintiffs of the settlement. (Lack

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1. The complaint alleged that defendants were engaged in a pattern or practice of employment discrimination against blacks with respect to job opportunities in the Des Moines Fire Department where, at the time the suit was commenced, there was only one black firefighter out of a total of 311.

of plaintiff class unity in this type of civil rights litigation is natural and common, and a fundamental part of the duties of counsel for the plaintiffs is to work with the class to achieve the unity requisite to a fair conclusion to the case.)

Under all of the circumstances, involvement of each lawyer was reasonably necessary. Each not only played a vital role, but each performed ably. The result is a detailed consent decree that is a very professional work product reflecting a high level of skill in the field of complex civil rights litigation. (The court credits defendants' lawyers as well as plaintiffs' lawyers.)

Plaintiffs seek an award of fees for the services of Russell Lovell II predicated on 990.2 hours of his time through entry of the consent decree at the rate of $100.00 per hour, plus a 75% increase thereon for quality of representation and risk of not prevailing, and 17.7 hours of his time for administration and implementation of the consent decree at the rate of $100.00 per hour.

Plaintiffs seek an award of fees for the services of Gregory Biehler predicated on 743.4 hours of his time at the rate of $60.00 per hour, plus a 75% increase thereon for quality of representation and risk of not prevailing.

Plaintiffs seek an award of fees for the services of Robert A. Wright, Sr., predicated on 84 hours of his time at the rate of $100.00 per hour.

Plaintiffs seek an award of fees for the services of Thomas I. Atkins predicated on 68.44 hours of his time at the rate of $200.00 per hour.

Plaintiffs seek an award of fees for the services of Margrett Ford predicated on 74.5 hours of her time at the rate of $125.00 per hour.

Plaintiffs seek an award of fees for the services of Dwight W. James predicated on 9.8 hours of his time (on the fees issue) at the rate of $135.00 per hour.

Plaintiffs seek an award of fees for the services of Roxanne Barton Conlin predicated on 140.5 hours of her time (on the fee issue) at the rate of $100.00 per hour.

Plaintiffs seek expenses as follows:

Lovell and Biehler	$6263.29
Atkins and Ford	$4476.40
James and Conlin	$1869.40[2]

Plaintiffs' evidence at the fees hearing establishes, and the court finds, that all of the time expended by all of plaintiffs' lawyers, although extensive, was reasonable except as noted in the next paragraph. (The time spent litigating the fees issue is regrettable, but that time expenditure became necessary when serious efforts by this court to get the parties to settle the fees issue failed. If the portion of the fees allowed by work on the main case are not significantly greater than the City offered in fee settlement negotiations, the court will entertain a timely motion by the City to reconsider the amount of fees allowed for litigating the fee issue.)

Mr. Atkins' approval of any settlement participated in by plaintiff Des Moines, Iowa, Branch of the NAACP was necessary. The necessity for his approval was very tardily discovered by plaintiffs and their counsel, Mr. Lovell and Mr. Biehler. They should have known this all along, and

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2. This figure includes an "estimate" of $100.00 for nine long distance telephone calls. Ms Conlin has advised the court that the bills for those calls have now been received and they exceed $100.00, but an amendment to their expense claim has not been filed due to the absence of the firm's bookkeeper. On that representation, the cost of the calls is accepted as $100.00.

any increase in total lawyer time due to tardy discovery of this should not be paid for by defendants. I am satisfied that the total time of plaintiffs' original lawyers, Mr. Lovell and Mr. Biehler, would have been less had Mr. Atkins been timely brought into this matter. Had Mr. Atkins been timely brought in, I believe Mr. Lovell would have expended 75 hours less than he did and Mr. Biehler would have expended 25 hours less than he did, and those hours will be disallowed.

Plaintiffs' evidence at the fees hearing (including affidavits) establishes, and the court finds, that $100.00 per hour is a reasonable prevailing market rate in the relevant community, Des Moines, for the services of Mr. Lovell, Mr. Wright and Ms. Conlin, and that $60.00 per hour is a reasonable rate for Mr. Biehler. The experience and abilities of each justify the hourly rate each seeks.

Mr. James is a very experienced and able lawyer whose customary hourly rate of $135.00 per hour may be reasonable for most of his services. However, the court finds that $100.00 per hour is currently the maximum prevailing market rate in Des Moines for litigating attorneys' fees under a fee-shifting statute.[3] Mr. James' time will be compensated at that rate.

Mr. Atkins' extensive experience and his position as general counsel of the NAACP establishes that he is in a class of his own as a complex civil rights litigator in

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3. The court takes judicial notice that the records of this court reveal that to date no fee as high as $100.00 per hour has been allowed for litigating attorneys' fees under a fee-shifting statute such as 42 U.S.C. § 1988. The most experienced lawyer in this area of law in Des Moines, Mark Bennett, asked for and was awarded $85.00 per hour in 1983 for litigating an attorneys' fee issue in a 42 U.S.C. § 1983 case. *Garmon v. Foust*, Civil No. 77-367-2 (S.D. Iowa June 21, 1983) (Order Allowing Attorneys' Fees).

the United States. $200.00 per hour is reasonable for his time. Ms. Ford's experience and position make it clear that $125.00 per hour is a reasonable rate for her time. Is allowance of their fees, however, to be limited by the currently prevailing market rate of Des Moines lawyers for civil rights litigation? I think not. The record shows that their involvement in the final phases of this case was a sine qua non of achieving a consent decree. Their involvement became necessary *because* Mr. Atkins is general counsel of the NAACP. The prevailing market rate for services of the general counsel of the NAACP in cases where his services are necessary, in Des Moines or any place else in the United States, is $200.00 per hour. The usual prevailing market rates for complex civil rights litigation in Des Moines apply only to services that are, or could be, provided by a Des Moines lawyer. *See Craik v. Minnesota State University Bd., supra,* 738 F.2d at 349; *Maceira v. Pagan, supra; Avalon Cinema Corp. v. Thompson, supra,* 689 F.2d at 140-41; *Chrapliwy v. Uniroyal, Inc., supra.* Mr. Atkins will be compensated at $200.00 per hour and Ms. Ford's time will be compensated at $125.00 per hour.

In respect to the services of Mr. Lovell and Mr. Biehler, plaintiffs seek an enhancement of 75% over the "lodestar" figure (time multiplied by hourly rate) for quality of services and risk of not prevailing.

The quality of representation by Mr. Lovell and Mr. Biehler was certainly good. However, quality of representation "may justify an upward adjustment only in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptions.'"

Blum v. Stenson, supra, 104 S. Ct. at 1549. Plaintiffs have offered evidence that the quality of representation was good and the result achieved was excellent, but their evidence does not satisfy the "superior" representation and "exceptional" success criteria for a quality enhancement.

The Eighth Circuit has held that a lodestar fee may be enhanced for the risk of not prevailing. *Craik v. Minnuesota State University Bd., supra* (in which the court allowed a 25% risk enhancement because of the substantial time put in on the case coupled with "the very real possibility that no fee at all would be obtained." *Id.* at 350.) Mr. Lovell and Mr. Biehler put in a substantial amount of time on this case, but I do not believe that there was ever a very real possibility that plaintiffs would not prevail and fees, therefore, not be obtained. Of course, there is no such thing as a "sure case," and even the best case contains some potential of somehow being lost. But for a fee enhancement to be justified, the risk of losing the case must, in my judgment, be significant—losing must be, as the Eighth Circuit said, "a very real possibility." To prove their case in court, plaintiffs would have had to prove a lot, and it would have taken a lot of work. But I think that there was little chance that they would not have done it. Plaintiffs have not established a significant, or very real possibility, that they would not have prevailed at trial.

Defendants make various challenges to the fee requests, including a contention that no fees may be allowed for the services of Mr. James and Ms. Conlin on the theory that they represent Mr. Lovell and Mr. Biehler rather than plaintiffs. The court finds no merit in that contention or in the other challenges of defendants.

The court finds that the expenses of plaintiffs' lawyers were incurred and are reasonable.

Allowable Fees and Expenses

The court allows the following fees and expenses of plaintiffs' lawyers:

FEES

Russell Lovell II	
932.9 hours @ $100.00	$93,290.00
Gregory Biehler	
718.4 hours @ $60.00	43,104.00
Robert A. Wright, Sr.	
84 hours @ $100.00	8,400.00
Thomas I. Atkins	
68.44 hours @ $200.00	13,688.00
Margrett Ford	
74.5 hours @ $125.00	9,312.50
Dwight W. James	
9.8 hours @ $100.00	980.00
Roxanne Barton Conlin	
140.5 hours @ $100.00	14,050.00
Total Fees	$182,824.50

EXPENSES

Lovell and Biehler	$6,263.29
Atkins and Ford	4,476.40
James and Conlin	1,869.40
Total Expenses	$12,609.09
Total Fees and Expenses	$195,433.59

Order

Plaintiffs are hereby allowed reasonable attorneys' fees and expenses, to be assessed as costs against defendants, in the total sum of $195,433.59, together with interest thereon from the date of this order.[4]

DATED this 24th day of October, 1984.

/s/ Harold D. Vietor
Harold D. Vietor
United States District Judge

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4. This order, which includes allowance for expenses, does not preclude taxation by the clerk of any other properly taxable costs that are not included in the expenses allowed in this order.

(Filed June 17, 1985)

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CIVIL NO. 82-460-D

DENNIS A. MOORE, et al.,
Plaintiffs,

v.

CITY OF DES MOINES, IOWA, et al.,
Defendants.

JERARD WATSON,
Petitioner,

v.

CITY OF DES MOINES, IOWA, et al.,
Respondents.

FINDINGS OF FACTS, CONCLUSIONS OF LAW AND ORDER DISMISSING COMPLAINT

This is a proceeding for declaratory relief and for damages to redress the alleged deprivation of rights secured to petitioner Jerard Watson by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. and the Thirteenth Amendment to the United States Constitution.

The proceeding is brought in the context of the *Moore* case pursuant to Paragraph 22(a) of the Consent Decree entered December 12, 1983. Petitioner Watson filed his complaint on March 22, 1984, and trial was held in January, 1985, and post-trial briefs were filed in late February.

The essence of petitioner's complaint is that he was discriminated against because of his race by respondents while he was a Des Moines City Fire Department trainee, and that the discriminatory treatment forced his resignation from the fire department.

FINDINGS OF FACT

Petitioner is a black citizen of the United States residing in Polk County, Iowa, in which the City of Des Moines is located.

Respondent City of Des Moines Fire Department is the respondent city's fire department.

On January 14, 1985, the parties filed a joint pretrial stipulation setting forth, *inter alia,* a "Statement of Undisputed Facts Related to EMT Issue" and a "Statement of Undisputed Facts" relating to other issues. The court includes by this reference the stipulated facts as part of the court's findings of fact.

The court further finds, as ultimate facts, the following:

Petitioner's performance in drill school was clearly unsatisfactory, especially in respect to the Emergency Medical Training (EMT) portion. By the seventh week of the drill school it was clear that he would not be able to get certified as an EMT-A; he was asked to resign and he did.

Respondents and their training personnel treated petitioner the same as other members of his class, making available to him the same assistance that was available to all class members. There was no racial discrimination in their treatment of him in the drill school or in their decision to request his resignation.

The EMT curriculum is job related for firefighters in Des Moines. Inclusion of the EMT program in the drill school was for the purpose of meeting the needs of the general public for emergency medical services. Respondents, in incorporating the EMT curriculum in drill school, were not motivated by discriminatory animus toward blacks.

The sole reason for requesting petitioner to resign was his unsatisfactory performance in drill school.

CONCLUSIONS OF LAW

The court assumes, without deciding, that petitioner established a prima facie case under the test established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1972). (The parties disagree on whether plaintiff has satisfied the "qualification" prong of the test; they agree that the other prongs are met. The court need not resolve the qualification dispute.)

Respondents have articulated a nondiscriminatory reason for requesting petitioner's resignation—his unsatisfactory performance in drill school—and petitioner has failed to show that the proferred reason is not the true reason, and is pretextual.

Petitioner's contention that the fire department does not have the legal authority to adopt tests or course requirements for the position of firefighter without civil service approval and authorization is without merit.

A complete lack of any evidence showing that the EMT curriculum has a disparate impact, and the fact findings the court has made that the EMT curriculum is job related, meets the needs of the public, and that its inclusion in the drill school program was not motivated

by discriminatory animus toward blacks, compels the conclusion that petitioner was not discriminated against by inclusion of the EMT curriculum in the drill school program.

Petitioner has failed to prove his case.

ORDER DISMISSING COMPLAINT

IT IS ORDERED that petitioner Watson's complaint be dismissed.

DATED this 17th day of June, 1985.

/s/ Harold D. Vietor
Harold D. Vietor, Chief Judge
Southern District of Iowa

(Filed September 23, 1985)

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CIVIL NO. 82-460-D

DENNIS A. MOORE, et al.,
Plaintiffs,

v.

CITY OF DES MOINES, IOWA, et al.,
Defendants.

WALTER C. WILLIAMS,
Plaintiff,

v.

CITY OF DES MOINES, IOWA, et al.,
Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING COMPLAINT

This case, *Williams v. City of Des Moines,* is a proceeding for money damages and other relief based on alleged racial discrimination.

The proceeding is brought in the context of the *Moore* case pursuant to Paragraph 22(a) of the Consent Decree entered December 12, 1983. Plaintiff Walter C. Williams filed his complaint on August 28, 1984, and trial was held in July 1985. Post-trial briefs were filed in September.

Division I of plaintiff's complaint alleges a racial discrimination violation of 42 U.S.C. § 2000e-2 (Title VII). Division II alleges claims under 42 U.S.C. §§ 1981, 1982 and 1983. Division III alleges a cause of action for unlawful employment practices in violation of Iowa Code Section 601A.2(5).

This court has jurisdiction of this matter under 42 U.S.C. § 2000e-5(f)(3), 28 U.S.C. § 1331 and 42 U.S.C. § 1981. Plaintiff's stated claim is properly before this court pursuant to pendent jurisdiction.

The essence of plaintiff's complaint is that he was discriminated against because of his race by the defendant Civil Service Commission while he was an applicant for the Des Moines Fire Department firefighter position and that but for the racially discriminatory animus toward him, he would have been certified for the firefighter position and presumably hired thereafter.

FINDINGS OF FACT

Plaintiff is a black citizen of the United States residing in Polk County, Iowa, in which the City of Des Moines is located.

Defendant Civil Service Commission of the City of Des Moines is a duly appointed local civil service commission established pursuant to Chapter 400, Code of Iowa.

On July 1, 1985, the parties filed a detailed joint pretrial stipulation setting forth, *inter alia*, a "Statement of Undisputed Facts" relating to the issues in this case. The court includes by this reference the stipulated facts as part of the court's findings of fact.

The court further finds, as ultimate facts, the following:

Plaintiff's score in the oral interview portion of the 1982 Selection Process for firefighter was insufficient to rank him among the persons certified.

Each commissioner treated plaintiff the same as all other applicants for firefighter, making available to him the same consideration of his qualifications that was available to all applicants. There was no racial discrimination in the commissioners' treatment of plaintiff during the oral interview or in their scoring of him at the close of the interview.

The sole reason for plaintiff's failure to be certified was that in competition with the other applicants he did not achieve a high enough score to be certified.

CONCLUSIONS OF LAW

The court assumes, without deciding, that plaintiff established a prima facie case under the test established in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1972). (The parties disagree on whether plaintiff has satisfied the "qualification" prong of the test; they agree that the other prongs are met. The court need not resolve the qualification dispute.)

Defendants have articulated a nondiscriminatory reason for plaintiff's failure to be certified—his score on the oral interview was not high enough to rank him among the certified candidates—and the plaintiff has failed to show that the proffered reason is not the true reason, and is pretextual.

Plaintiff's contentions that the Commission discriminated against him because it failed to allow him "extra credit" for his prior years of service on the Des Moines Fire Department and/or that it discriminated against him

because it failed to find him the most qualified candidate because of his prior years of service are without merit.

A complete lack of any evidence showing that the defendant Commission, or individual commissioners, treated plaintiff differently or approached the scoring of his interview differently than other applicants, and the fact findings the court has made that the commissioners were not motivated by discriminatory animus toward blacks, compels the conclusion that plaintiff was not discriminated against by the Commission's failure to accord him special consideration for his prior years of service.

Plaintiff has failed to prove his case.

ORDER DISMISSING COMPLAINT

IT IS ORDERED that plaintiff Williams' complaint be dismissed.

DATED this 23rd day of September, 1985.

/s/ Harold D. Vietor
Harold D. Vietor, Chief Judge
Southern District of Iowa

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 84-2514SI

September Term, 1983

Dennis A. Moore, et al,
Appellees,

vs.

City of Des Moines, Iowa, et al,
Appellants.

Appeal from the United States District Court for the Southern District of Iowa

JUDGMENT

This appeal from the United States District Court was submitted on the record of the said District Court and briefs of the parties and was argued by counsel.

After consideration of the premises it is ordered and adjudged that the judgment of the said district court in this cause is hereby affirmed in accordance with the opinion of this Court.

Court costs are to be paid by the City; the plaintiffs are requested to submit affidavits concerning the amount of costs and attorneys' fees incurred on appeal.

June 25, 1985

A true copy.

(Seal) /s/ Robert D. St. Vrain

ATTEST:

Clerk, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

8/30/85

(Filed September 3, 1985)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-2514-SI

Dennis A. Moore, et al.,
Appellees,

vs.

City of Des Moines, Iowa, et al.,
Appellants.

Appeal from the United States District Court for the
Southern District of Iowa
82-460-D

Appellees' motion for attorney's fees is hereby approved in the amount of $19,687.99 as follows:

Russell E. Lovell, II		
127.1 hours at $100	$12,710.00	
Expenses	153.95	
		$12,863.95
Roxanne Barton Conlin		
63.4 hours at $100	$6,340.00	
Expenses	484.04	
		$ 6,824.04
TOTAL FEE		$19,687.99

Ms. Conlin's hotel bill is reduced by fifty percent.

Appellants' petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

August 19, 1985

A true copy.

(Seal) /s/ Robert D. St. Vrain

ATTEST:

Clerk, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX D

February 14, 1983

Russell E. Lovell, II
Attorney at Law
3111 40th Place
Des Moines, Iowa 50310

and

Gregory L. Biehler
Smith, Schneider & Stiles, P.C.
4717 Grand Avenue
Des Moines, Iowa 50312

Re: City's offer of a Consent Judgment in
Federal District Court Civil No. 82-460-D
(Dennis A. Moore and Gregory B. Perry and
Des Moines NAACP v. City of Des Moines, et al)

Dear Russ and Greg:

We are most happy to present for the NAACP and other named plaintiffs review and consideration a Consent Judgment which my clients, the various defendants in the above captioned action, stand ready to enter into immediately.

It proceeds upon two major premises: 1) that it should be a simple, fair and direct resolution of plaintiffs' complaint and 2) that it should exhibit the spirit of mutual commitment and respect that will allow the task to be accomplished effectively and enduringly.

You will note that in the Consent Judgment the defendants shall pay for all attorney fees incurred to the date of delivery of the proposed Judgment and those associated with the taking of Commissioner Costanzo and Fire Chief Williams depositions as well as the completion of any depositions previously begun but not yet completed on the date of delivery.

We do hereby formally present the Consent Judgment to plaintiffs. We would welcome an immediate acceptance but do hereby formally request that plaintiffs

[-2-]

respond at least no later than one week beyond the close of the depositions.

Sincerely,

/s/ Nelda Barrow Mickle
Nelda Barrow Mickle
City Solicitor

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Civil No. 82-460-D

DENNIS A MOORE, et al.,
Plaintiffs,

vs.

CITY OF DES MOINES, IOWA, et al.,
Defendants.

CONSENT JUDGMENT

This matter comes on pursuant to the joint motion of the parties for the Court to consider the proposed Consent Judgment and for the reasons stated therein to approve the same and order the entry of such judgment. The Court has now fully reviewed and considered the request of the parties and is prepared to accept the following Consent Judgment as an appropriate, prudent and fair resolution of the matter:

WHEREAS, the City is desirous of rectifying those elements within its system of fire fighter application, certification, hiring, training and work conditions which have produced the fact of only one black fire fighter in a force of 311 in the year 1983, some ten years after the Civil Rights Act of 1964 was made applicable to state and local governmental bodies.

WHEREAS, the City stands at this juncture having already taken certain significant strides in the years since 1972 toward this goal. Its written personality test, the physical agility

and the oral interview portions of the examination for the entry level fire fighter position were scrutinized by a validation team from the U.S. Civil Service Commission commencing in 1973 and concluding in 1975. The recommended steps were implemented. Through the years various recruitment efforts were undertaken to generate a greater minority participation.

WHEREAS, the NAACP stands at this juncture as the representative of the class of plaintiffs who while alleging discrimination maintain sufficient confidence in the integrity of the civil service selection system and desire to accord the City Fire Chief and his supervisory staff a real and ample opportunity to hire, train and promote blacks so as to achieve a black participation in the City fire fighting work force commensurate with the black presence in the work force at large.

WHEREAS, the City and the NAACP therefore approach the task imbued with mutual respect for the efforts which each has taken, and do hereby undertake to bring the matter of the past and continuing failure of the system to attract and effectively utilize black persons as Des Moines fire fighters to the point of public attention and public resolution.

WHEREFORE, the parties do hereby consent to, and agree to be bound by, the following terms and conditions of this decree:

1) The City of Des Moines Civil Service Commission, assisted where appropriate by the City of Des Moines Personnel

Department and Fire Department, shall conduct affirmative recruitment of black persons for future employment as more fully set out in Exhibit ....., attached hereto and by this reference made a part hereof.

2) The City of Des Moines Civil Service Commission shall conduct concurrent statistical analysis of each part of its selection process during each examination period for the entry level fire fighter positions so that any adverse or disparate impact or effect of such test elements on black participants can be immediately identified and eliminated.

3) The City of Des Moines Civil Service Commission shall, until such time as there is in the Fire Department a proportionate black participation, report to the Court at the conclusion of each examination process the racial character of the pool of participants and of those selected for certification for hire or promotion.

4) Until the proportional black participation is achieved in the entry level fire fighter positions, the Civil service Commission shall include in each certification of an original or reserve list a sub-list of the five black persons with the highest standing, including ties for fifth place, and a sub-list of the five non-black persons with the highest standing, including ties for fifth place, with an appropriate report to the Court of each such certification.

5) The City of Des Moines through its City Manager and Fire Chief shall select alternatively from the black sub-list and the non-black sub-list until the proportional black presence in the fire fighter ranks is achieved. Vet-

erans preference shall operate only among the sub-list selections; it shall not operate to prevent a one-for-one appointment.

6) The City shall report semi-annually to the Court the number of vacant positions which existed in the Fire Department during the preceding six months, the racial composition of the successful applicants selected for vacant positions, and the number of black fire fighters successfully completing their probationary period of employment.

7) The City shall actively monitor through its EEO Officer the experience and progress during training and probationary period of black fire fighters and shall, upon discovery of any unnecessary impediments to the effective learning of job duties, skills and abilities by the black fire fighters, report such impediments to the Court along with the remedial or ameliorative action undertaken.

8) The City shall make all entry level fire fighting positions becoming open after the exhaustion of the present reserve list available first to the plaintiffs, named and class, who can affirmatively show that their application and participation in any post 1972 selection process, if scored in the manner utilized in the 1982 examination process, would have placed them among the

ten persons with the highest standing, including ties for tenth place in the particular process in which they participated, or would have placed them among the persons certified on any reserve list. Such relief shall be conditional only upon successful completion of the medical examination, without regard to any medical condition developing subsequent to the original application unless it be clearly determined incumbent fire fighters developing

such condition are dismissed, and the immediate filing by each such plaintiff of his/her intent to make such showing and to claim such relief.

9) The City shall assist each plaintiff seeking to make such showing by providing all data concerning his/her examination performance, as well as the result which would have been achieved in utilizing the 1982 examination scoring process and the relative standing which would have resulted.

10) The City affirmatively accepts the Court's retention of jurisdiction over these matters to the end that compliance with this decree shall be demonstrably full and complete and shall secure to the paintiffs and to the defendants the black participation in the City of Des Moines Fire Department work force commensurate with the black presence in the work force at large.

11) The City acknowledges that the plaintiffs' role in bringing the obvious need for greater black participation in the City's fire fighting function to public attention has required a substantial outlay of NAACP funds for attorney fees, the cost of

which should be borne in significant part by the system which has produced the need for such efforts. To that end, the City agrees to pay at the hourly rate charged to the NAACP for all attorney fees accruing to the date of delivery to plaintiff's attorneys of this proposed Consent Judgment, to pay as well for all attorney fees associated with the taking of the deposition of Commissioner Ralph Costanzo and Fire Chief Lee Williams and the completion of any depositions remaining open upon the date of delivery of this proposed Consent Judgment and to pay

all costs to the date of delivery of this proposed Consent Judgment.

12) The NAACP with the cooperation and assistance of the City has engaged in substantial and indepth scrutiny of the 1982 Civil Service Commission's examination and certification process as it has functioned as a whole and in each individual instance involving black applicants. It has found no instance collectively or individually of a discriminatory intent, impact, effect, or result within such examination and certification process. Therefore, the NAACP, where and when appropriate, agrees to make publicly clear its unequivocable position that the 1982 process operated fairly upon all applicants, including all black applicants who chose to seek certification as one of the ten persons with the highest standing among the competitors.

13) The NAACP pledges its considerable stature in the black community to the active creation of a positive attitude toward City of Des Moines fire fighting employment conducive to attract-

ing and supporting the participation of black persons with a serious commitment, able and capable work attitudes and the spirit of determination and tenacity necessary to the successful performance of duties as a fire fighter.

14) The NAACP agrees to assume an active role in the Civil Service Commission's recruitment of blacks and to assist in monitoring black participation in the training and the probationary period of employment to the end that the blacks selected are able to successfully complete with pride and honor their entry into the Des Moines fire fighting work force.

15) The parties accept this decree as the final and binding resolution of the issues treated herein and agree

to notify all identifiable class members by registered mail and to publish a copy of such notice in the Des Moines Register once each week for three consecutive weeks so that any objections to such judgment may be raised and formal hearing requested.

The Court does hereby accept, approve and order the entry of this judgment at the conclusion of the thirty-day period for the filing of objections by class members; said thirty-day period to run from the date and/or filing of this judgment whichever is later.

-8-

.....

Harold D. Vietor
United States District Judge

The undersigned agree to the entry of this judgment.

CITY OF DES MOINES, IOWA AND CITY OF DES MOINES CIVIL SERVICE COMMISSION

By .....
Philip T. Riley
Corporation Counsel
City Hall
East 1st & Locust
Des Moines, Iowa 50307

By .....
Nelda Barrow Mickle
City Solicitor
City Hall
East 1st & Locust
Des Moines, Iowa 50307

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

By .....
Russell E. Lovell, II
Attorney at Law
3111 40th Place
Des Moines, Iowa 50310

By .....
Gregory L. Biehler
Smith, Schneider & Stile, P.C.
4717 Grand Avenue
Des Moines, Iowa 50312

NAACP Special Contribution Fund

186 Remsen Street Brooklyn, New York 11201
(212) 858-0800

August 19, 1983

Robert A. Wright, Esq.
Wright & Wright
621 Midland Financial Building
Des Moines, Iowa 50309

Re: *Moore, et al. v. Des Moines, et al.*

Dear Bob,

I have received and reviewed the materials you recently sent concerning the above case, along with your very helpful letter of August 11, 1983.

1. I must point out that no authorization was ever sought from, or given by, this office for the Branch to be involved in this litigation. The involvement of any unit of the NAACP in litigation without the prior express approval of the General Counsel is inconsistent with, and directly contravenes, NAACP's long-established policy. I am, therefore, asserting complete control over all further participation by the NAACP in this litigation. In that connection, it will be necessary for local counsel to make necessary submissions to the Court adding as counsel of record the following individuals:

Thomas I. Atkins, General Counsel
Charles Carter, Associate General Counsel
Margrett Ford, Assistant General Counsel

NAACP Special Contribution Fund
186 Remsen Street
Brooklyn Hts., N.Y. 11210

To the extent *pro hac vice* motions need to be made, I trust that such will be prepared and submitted to the court.

2. My review of the pleadings, including the complaint, responses and proposed Consent Decree, persuades me that much progress has been made in addressing the issues which gave rise to the lawsuit. I am particularly impressed with the thoroughness with which some of the contingency issues have been provided for, such as the eventuality that those selected for probationary status may never wind up permanently appointed. All in all, I believe that the Consent Decree proposed as a settlement vehicle represents thoughtful and skilled lawyering. But for the reservation I set forth below, I would be inclined to permit the Branch's approval of this document as a means of ending the litigation.

3. I am inclined to agree with the reservations expressed by the Branch President, Mr. Larry Carter, about the consequences of a broad settlement which, nonetheless, failed to resolve the particular claims of Mr. Walt Williams.

Specifically, it appears to me that the position of the City and its Chief represents nothing more than petty and vindictive obstinacy, and should not be permitted to effect the probable adverse impact upon Mr. Williams which I fear would result from "carving him out" of the settlement. While this approach might well be feasible with respect to other individual claimants whose claims have not risen to the same level of controversy as Williams', it is apparently unlikely that the City will objectively process Williams' claims, because of the attitude which has already been expressed by the Chief.

4. Under these circumstances, it would be inappropriate to assume that the language in the decree equitably preserves Mr. Williams' rights on terms equal to those of other claimants, and I will not permit the Branch to be a party to the Consent Decree as it is now drafted.

5. It is my hope that the plaintiffs' attorneys can return to the bargaining table and obtain more equitable relief for Mr. Williams, in light of the fact that his plight played a substantial role in inducing the Branch to become involved in the first instance and his claim appears to be highly meritorious.

To the extent I, or my office, can play a helpful role in this effort, we stand ready to assist. Please keep me posted, and see that we are served with copies of any further case-related documents and pleadings.

Very truly yours,

/s/ Thomas I. Atkins
Thomas I. Atkins

/cej

cc: Mr. Larry W. Carter
Russell E. Lovell, II, Esq.
Gregory L. Biehler, Esq.

(Filed September 7, 1983)

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Civil No. 82-460-D

DENNIS A. MOORE, et al.,
Plaintiffs,

vs.

CITY OF DES MOINES, IOWA, et al.,
Defendants.

DEFENDANTS' APPROVAL OF PROPOSED CONSENT DECREE

COME NOW the Defendants in the above captioned case to inform the Court of the formal approval and acceptance of the proposed Consent Decree and in support thereof to state:

1) that the Defendant Civil Service Commission formally approved the proposed Consent Decree on August 30, 1983 and forwarded its approval and recommendation to the City Council for its meeting of September 6, 1983;

2) that at its regular meeting of September 6, 1983, the Defendant City Council of the City of Des Moines, Iowa received the Civil Service Commission's approval and recommendation and itself formally approved the proposed Consent Decree by Roll Call No. 4274, dated September 6, 1983; and

3) that such formal approvals were ordered to be transmitted to the Court by the filing of a certified copy of Roll Call No. 4274, dated September 6, 1983 together with all attachments all of which are attached hereto and by this reference made a part hereof.

WHEREFORE, the Defendants do hereby submit to the Court their approval of the proposed Consent Decree and do urge that the Consent Decree be entered by the Court upon being informed of the Plaintiffs' approval.

Respectfully submitted,

By /s/ Nelda Barrow Mickle
Nelda Barrow Mickle
City Solicitor
City Hall
East First & Locust Streets
Des Moines, Iowa 50307
Telephone: 515/283-4130
Attorney for Defendants

Copy to:

Russell E. Lovell II
3111 40th Place
Des Moines, Iowa 50310
Telephone: 515/271-2952

Gregory L. Biehler
Smith, Schneider, & Stiles, P.C.
4717 Grand Avenue
Des Moines, Iowa 50312
Telephone: 515/274-2345
Attorneys for Plaintiffs

(Certificate of Service Omitted)

Roll Call Number 4274
Date September 6, 1983

(Certificate of Helen W. Barlow Dated September 7, 1983)

WHEREAS, in settlement of a lawsuit alleging employment discrimination in the Des Moines Fire Department Civil No. 82-460-D, *Dennis A. Moore, et al. v. City of Des Moines, Iowa* which is presently pending in U.S. District Court for the Southern District of Iowa (Central Division), the attached proposed Consent Decree has been prepared for the approval of the parties; and

WHEREAS, the Civil Service Commission of the City of Des Moines, Iowa has made its Civil Service Administrative Officer fully available throughout the course of the litigation to assist in the negotiation of appropriate and equitable terms and conditions of such decree and such Civil Service Commission has now formally approved the proposed Consent Decree at its meeting of August 30, 1983, and does forward its approval and its recommendation that this Council approve the proposed Consent Decree by the attached communication; and

WHEREAS, the City Manager and the Fire Chief have reviewed and endorsed the proposed Consent Decree and do hereby recommend that the City Council approve the Consent Decree; and

WHEREAS, it appears that it is in the best interest of the City of Des Moines and its Fire Department for the City Council to approve the entry of the proposed Consent Decree and thereby undertake to attract and effectively utilize qualified black persons as Des Moines fire fighters.

NOW THEREFORE BE IT RESOLVED by the City Council of the City of Des Moines, Iowa that the ap-

proval of the attached proposed Consent Decree by the Civil Service Commission of the City of Des Moines, Iowa is hereby received and filed along with its recommendation that this Council itself grant approval of the decree.

BE IT FURTHER RESOLVED by the City Council that the attached proposed Consent Decree is hereby approved, with the Corporation Counsel and the City Solicitor authorized and directed to sign said decree on behalf of the City and to deliver such document to Plaintiffs' attorneys for execution and filing in federal district court.

BE IT FINALLY RESOLVED that the City Solicitor is hereby directed by appropriate filing, including a certified copy of this resolution, to immediately apprise the federal court of the City Council's approval of the proposed Consent Decree.

Moved by Nahas to adopt.

FORM APPROVED:

/s/ Nelda Barrow Mickle
Nelda Barrow Mickle
City Solicitor

COUNCIL ACTION:	Yeas	Nays
Crivaro		√
Szymoniak	√	
Priebe	√	
Nahas	√	
Brooks		√
Flagg		√
Urban	√	
TOTAL	4	3

MOTION CARRIED APPROVED

/s/ Pete Crivaro, Mayor

CERTIFICATE

I, HELEN W. BARLOW, City Clerk of said City hereby certify that at a meeting of the City Council of said City of Des Moines, held on the above date, among other proceedings the above was adopted.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal the day and year first above written.

/s/ Ben R. Lehman
Temporary City Clerk

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Civil No. 82-460-D

DENNIS A. MOORE, et al.
Plaintiffs,

vs.

CITY OF DES MOINES, IOWA, et al.,
Defendants.

CONSENT DECREE

The plaintiffs, Dennis Moore, Gregory Perry and NAACP, Des Moines Branch, filed this action on August 24, 1982, against *inter alia* defendants City of Des Moines, Des Moines Fire Department, Des Moines Civil Service Commission and Des Moines Board of Trustees of the Fire Retirement System (hereinafter collectively referred to variously as the "defendants" or the "City"). The complaint alleges that the defendants have been engaged in a pattern or practice of employment discrimination against blacks with respect to job opportunities in the Des Moines Fire Department, in violation of rights secured to the plaintiffs and all others similarly situated by the Thirteenth and Fourteenth Amendments to the United States Constitution, by 42 U.S.C. sections 1981, 1983, 1985(3), and 1988, by Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. section 2000e *et seq.* ("Title VII"), by Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. section 2000d *et seq.* (Title "VI"), by section 122 of the State and Local Fiscal Assistance Act of 1972

(the "Revenue Sharing Act"), 31 U.S.C. section 1242, by section 518(c) of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 42 U.S.C. section 3766(c) (the "Safe Streets Act"), by section 815(c) of the Justice System Improvement Act of 1979, 42 U.S.C. section 3789 (c) and the Supremacy Clause of the United States Constitution. Plaintiffs' causes of action stated under 42 U.S.C. sections 1981, 1983, 1985(3), and 1988 are also stated directly under the Constitution. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1343(3) and (4), Section 706(f)(3) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(f)(3), and Section 124 of the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. § 1244(a), (b).

The City acknowledges the fact that, as of the time of the commencement of both its 1982 fire fighter selection process and this litigation, it employed only one black fire fighter in a force of 311, some ten years after Title VII and eighteen years after Title VI of the Civil Rights Act of 1964 were made applicable to state and local governmental bodies. The City acknowledges that the existence of this substantial underrepresentation of blacks in the DMFD, when coupled with the alleged disparate impact on blacks of certain selection criteria for fire fighter and certain personnel practices within the DMFD, may give rise to an inference that discrimination has occurred.

The City acknowledges that the plaintiffs, through the filing of administrative charges with various federal and state agencies and through pre-litigation negotiation, served as one of the catalysts in 1982 to the modification of the Civil Service Commission's fire fighter selection process and to the improved minority recruitment effort made by the City. The City further acknowledges that immediately upon commencement of this litigation, plain-

tiffs sought a temporary restraining order with regard to the 1982 selection process, defendant Civil Service Commission voluntarily consented to entry of a temporary restraining order, and this Court entered a Consent Order to Temporary Restraint modifying the 1982 selection process on August 26, 1982. The plaintiffs acknowledge the City's cooperation in making the above-described changes in 1982 and further acknowledge that the overall certification and selection rate for fire fighters based on the 1982 selection process does not indicate a disparate effect on blacks as a class.

The City denies that it is presently, or has ever been, engaged in a pattern or practice of racial discrimination in the selection or employment of uniformed personnel for the Des Moines Fire Department (hereinafter DMFD); however, the City is desirous of rectifying those elements within its system of fire fighter application, certification, hiring, training and working conditions which have produced a fire fighter force that included only one black as of 1982. The City is desirous of continuing the fire fighter recruitment and selection process, as modified in 1982, subject to the affirmative hiring relief contained in this Decree and this Court's retained jurisdiction. The plaintiffs, while alleging a pattern or practice of racial discrimination, have sufficient confidence in the integrity of the 1982 Civil Service fire fighter selection process that they agree to its use in future selection processes, subject to the provisions of this Decree providing for affirmative hiring relief and continuing jurisdiction of the Court. Plaintiffs and the City recognize that at the present time there are insufficient black uniformed personnel in the DMFD, and that every endeavor should and will be made to increase the number of blacks serving in uniformed positions with the DMFD to the point where the percent-

age of blacks on the DMFD force is approximately equal to the percent of blacks in the Des Moines general population.

The parties, being desirous of avoiding the burden, expense and uncertainty of further contested litigation and desirous of eliminating any disadvantage to blacks that may have resulted from any past practice with respect to job opportunities in the DMFD—hereby agree and consent to the entry of this Decree. The parties signatory hereto, by agreeing and consenting to the entry of this Decree, stipulate to the jurisdiction of the Court over the respective parties and acknowledge the Court has jurisdiction over the subject matter of this action, and waive a hearing and the entry of findings of fact and conclusions of law on all issues involved herein. However, this Decree shall constitute neither an admission by the defendants nor an adjudication by the Court on the merits of the allegations of the plaintiffs.

This Decree is entered into as a settlement of an existing dispute between plaintiffs and defendants as to appropriate and valid criteria and procedures for the hiring of fire fighters for the City of Des Moines. This Consent Decree satisfies and resolves all claims of plaintiffs and the class they represent of racial discrimination with respect to those matters set forth in their Complaint. Both plaintiffs and the class they represent shall seek no further relief for the acts, practices or omissions alleged in the Complaint save to enforce the provisions of this Decree, thereby waiving the right to seek further relief. Subject to the provisions of paragraphs 22 and 35 of this Decree, plaintiffs agree that this Consent Decree is fully binding individually and on the class they represent. Defendants agree that this Consent Decree is fully binding on each of them, each of their officers, agents, representa-

tives, employees and successors, and all other persons acting in concert with them who have notice of this Decree. The parties further aver that this action may be properly maintained as a class action under Rule 23 of the *Federal Rules of Civil Procedure*, and that the named plaintiffs are proper representatives of that class.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

I

GENERAL

1. The major purpose of this Decree is two-fold: to ensure that blacks are considered for employment as fire fighters by the City on the same basis as all other applicants, and that the present effects of the City's alleged prior discriminatory employment practices against blacks be corrected. In particular, defendants adopt, and shall seek in good faith to achieve, the objective of employing blacks in all uniformed ranks within the DMFD in numbers which roughly approximate the percentage of blacks in the Des Moines general population. It is recognized that the process of increasing the numbers of black applicants for employment with the DMFD is facilitated by a process free of unlawful barriers to their entry and by increased recruitment efforts directed toward blacks.

2. The City and its officials, employees, agents and all persons in active concert or participation with them, hereafter shall not engage in any act or practice with respect to the recruitment or hire of applicants for employment in the DMFD, or the training, assignment, transfer, promotion, discipline, retention, compensation, or terms and conditions of employment of employees of the DMFD which has either the purpose or the effect of discriminating

against blacks on the basis of race. In the event that defendants' obligations under this Decree conflict with their obligations under any contractual provision, local rules, local ordinances, or state laws, defendants shall raise the Decree as a defense in any action seeking to compel defendants to apply the conflicting state or local law or contractual provision. The City shall take every reasonable step to assure that all members of the DMFD are fully informed with respect to the City's commitments and obligations under this Decree and the role each is to play in the realization of such responsibilities. Further, the City undertakes to assure that no member of the Des Moines Fire Department interferes with the enforcement of this Decree by any means. Further, defendants shall not retaliate against or in any respect adversely affect any person because that person has lawfully opposed discriminatory policies or practices or because of that person's participation or cooperation with the initiation, investigation or litigation of any charge of discrimination based on race, or the administration of this Decree.

3. Plaintiffs Moore and Perry brought this action as a class action, and in its order of ....., 1983, the Court certified the plaintiff class. For purposes of this Decree, the Court hereby adopts the class description set forth in that order:

> The plaintiffs' class is composed of all black persons who, on or after March 24, 1972, applied for employment as a fire fighter with the Des Moines Fire Department and were rejected during the selection process or the probationary period, or who would have sought employment as a fire fighter with the DMFD but for the alleged discriminatory practices and reputation of the defendants.

4. The statistical background upon which the entry of this Decree is premised can be summarized as follows, with regard to facts up to or at the time of the commencement of this suit:

a. At the time of the commencement of this suit, on August 24, 1982, the DMFD employed only one (1) black among its 311 uniformed employees. The Department's uniformed work force composition of .3% black is in sharp contrast to the 6.8% black general population figures for the City of Des Moines.

b. From March 24, 1972, to the commencement of this suit on August 24, 1982, the DMFD hired 106 persons as fire fighters. Three of these were black, but only one (1) black attained nonprobationary fire fighter status.

c. In *Hazelwood School Dist. v. United States,* 433 U.S. 299 (1977), the Court approved the use of the of the binomial distribution statistical formula to determine the statistical probability that the results of a hiring process over a particular time frame were influenced by racial considerations. When the DMFD hiring process is evaluated based on the number of fire fighters achieving nonprobationary status, the actual results of the process are a negative 2.351 standard deviations less than the expected results in a nondiscriminatory system. Where the difference between the expected value, seven black fire fighters reaching nonprobationary status, and the observed number, one black fire fighter achieving nonprobationary status, is greater than two or three standard deviations, the hypothesis that fire fighters were hired without regard to race is considered suspect. The Civil Service Commission argues that achieving nonprobationary status should not be the measure to

which the binomial distribution is applied, but rather that the formula should be applied to the persons actually hired as probationary fire fighters. Applying the binomial distribution formula as urged by the Commission, the actual results of the process (3 black probationary fire fighters) would be a negative 1.62 standard deviations less than the expected results (seven black probationary fire fighters) in a non-discriminatory system, a statistical showing that would not necessarily reject the hypothesis that fire fighters were hired without regard to race.

d. No statistical data was maintained by the City regarding applicant flow for the position of fire fighter prior to the 1975 selection process. There were no known black applicants for fighter as recently as the 1975 selection process, a process in which there were at least 90 applicants. In plaintiffs' view the lack of black participation stemmed from the perception in the black community of the DMFD as an employer that discriminated on the basis of race. Defendants commenced overall recruitment efforts in 1977 and added a minority dimension to their recruitment effort in 1978. This recruitment effort has gradually produced results. Black applicants numbered seven (7) in 1977, or 5.3% of the 130 applicants. Black applicants numbered seven (7) again in 1978, or 5.9% of the 118 applicants. Black applicants increased to thirty (30) in 1980, or 7.8% of the 382 applicants. Black applicants increased to eighty-two (82) in 1982, or 15.2% of the 539 applicants.

e. In plaintiffs' view this perception of the black community that defendants discriminated on the basis of race may also have discouraged blacks who did apply from completing the selection process. For the

application periods 1977-1980, 44 of 630 applicants were black. While 35 of the 44 blacks met the minimum qualifications, only 19 of the 35 appeared to take the written test, a show up rate of 54.2%. In contrast, 372 of the 466 white candidates who met the minimum requirements appeared to take the written test, a show up rate of 79.8%. During this period, the black show up rate was 67.9% of the white show up rate, significantly less than four-fifths the white show up rate. Plaintiffs contend that under the EEOC's Rule of Four-fifths, this step in the selection process has had a disparate impact on blacks. The Civil Service Commission believes that under the *Uniform Guidelines* the use of a show up rate as a selection instrument in order to show adverse impact is inappropriate.

f. The Civil Service Commission is currently using and has since 1975 used a written test, Personality Research Form-A, as the first stage of its selection process for fire fighter. In the period 1977-1980, including the 1980 application period during which Plaintiffs Moore and Perry applied, there were 372 white and 19 black candidates that took the written test. Using the minimum score of 21, 297 of the white applicants passed the test, or 79.8%, and 11 of the black applicants passed the test, or 57.8%. During this period, the black pass rate on the written test was 72.5% of the white pass rate, significantly less than four-fifths the white pass rate. Plaintiffs contend under the EEOC's Rule of Four-fifths, the Civil Service Commission's use of Personality Research Form-A has had a disparate impact on blacks. The Civil Service Commission contends that because of the small number of black applicants in the years 1977-1980 the

data upon which plaintiffs' assertion is based is not statistically significant. The Commission further contends that its test was validated by a criterion-related study conducted in the years 1973 through early 1975 by the U.S. Civil Service Commission.

5. The statistical background upon which the entry of this Decree is premised can be summarized as follows, with regard to the modified 1982 selection process:

a. Eighty-two blacks applied, double the number who applied in the three preceding application periods combined. The 82 black applicants represented approximately 15% of the 539 total applicants.

b. Of the ten top-ranked applicants (plus ties for tenth), blacks numbered 4 and nonblacks numbered 7 (one nonblack tied for tenth). The next ten top-ranked applicants included 6 blacks and 4 nonblacks. Certification of the first group and the subsequent certification of the second group as a reserve list would have resulted in an overall certification rate for the 1982 selection process that did not have a disparate impact on black applicants as a group. The statutory certification process was modified by Court order, dated August 26, 1982, which required the Civil Service Commission, in certifying the original list of the top ten (10) ranked candidates, to certify in two sublists the top five black and top five nonblack applicants. As there was a tie for fifth place on each of the sublists, the Commission, in implementing the Court Order, applied the statutory provision which requires the inclusion of all persons tying for tenth place on the certified list to the persons who tied for fifth place on the two sublists. The original certified list therefore contained 6 blacks and

7 nonblack candidates. The Commission subsequently certified under the Court Order a reserve list of 4 black and 4 nonblack candidates. With regard to the 1982 process, if the original and reserve list certifications are combined, the results show that the same persons certified under the Court Order would have been certified under the statute in the absence of the Order.

c. The City offered employment to each person on the initial certified list. Four of the black applicants have successfully completed the training academy and are presently working as probationary fire fighters. One black applicant declined the City's offer of employment, and another withdrew/resigned during the first week of training academy. All four blacks on the reserve list were offered appointments and are currently employed as probationary fire fighters. The reserve list for the 1982 selection process is exhausted. The overall selection rate for the 1982 process has not had a disparate effect on black applicants.

II

QUALIFICATIONS AND SELECTION CRITERIA

6. Each applicant for the position of fire fighter with the DMFD is required at the time of application to meet various criteria, which include but are not limited to the following:

a. The applicant must be at least 18 years of age and not yet 32 years of age as of the date of application.

b. The applicant's weight must be in proportion to height.

c. The applicant must have a high school diploma or GED equivalency diploma.

d. The applicant's vision must be 20/20 or better in both eyes if glasses are not worn, or 20/30 in each if correctable to 20/20.

The above-described criteria were used by the City prior to the 1982 selection process and were in no way modified in 1982.

7. A fire fighter applicant who meets the above criteria is eligible for the examination stages of the selection procedure, which include but are not limited to the following:

a. The applicant must take and pass a written examination, Research Form-A, published by Research Psychologists Press, Inc., Port Huron, Michigan, and achieve a minimum score of 21.

b. The applicant must take and pass a physical agility test Fire Fighter Physical Strength & Agility Examination - 4th Rev., 4-15-1982 (ladder climb, dummy drag, relay race, squat thrust and dark room).

c. The applicant is investigated by fire fighters employed by defendant DMFD and a background investigation report is made to the Civil Service Commission.

d. The applicant must be evaluated in an oral examination conducted by the Civil Service Commission, which examination includes inquiry into and evaluation of data included in the applicant's background investigation report. The background investigation report and inquiry made by the Civil Service Commission contributes a maximum of twenty-one possible points out of the 99 points which a candidate can

receive on the oral examination. In order to pass the oral examination, a candidate must achieve a minimum score of 63 points, of which 8 points must be contributed by the Commission's evaluation of the applicant's background report.

e. The applicant must appear and pass a medical examination administered by the Board of Fire Trustees.

8. The 1982 selection process was modified by the Civil Service Commission so as to remove the alleged adverse impact of the written test on blacks and the physical agility test on women. The same examinations and the same passing scores were retained, as was the requirement that a candidate must achieve a passing score on each examination in order to be ranked. The modification changed the weight given the written examination and the physical agility examination in the final ranking of candidates. Prior to 1982, for those candidates passing each exam, the Commission gave equal weight to each candidate's performance on the written test, the physical agility test, and the oral examination, with each counting one-third of the total score. As modified in 1982, the written examination and the physical agility test were used only as pass-fail measurements and scores achieved on these two tests were not used by the Commission in the final ranking of candidates; candidates had to pass both tests in order to be scheduled for an oral examination, but the final ranking was based on the candidate's oral examination score alone. In addition, due to the unusually large number of candidates in 1982 and the expense of medical examinations, the medical examination administered by the Board of Fire Trustees was scheduled after the final ranking of candidates and was given only to the

top twenty-nine (29) ranked candidates, a number judged sufficient to complete the certification of both an initial and a reserve list allowing for the usual number of medical rejections. No other changes were made to the pre-1982 selection process or criteria.

9. The Civil Service Commission selects the ten (10) highest ranked candidates and certifies this eligibility list to the City Council. If a tie occurs in the examination scores which would qualify persons for the tenth position on the list, the list shall include all persons who qualify for the tenth position. Iowa Code section 400.11 (1983). The Commission shall hold in reserve a second list of the ten persons next highest in standing, and, if the first list of ten be exhausted within one year, may certify this second list to the Council as eligible for appointment. The City Council receives and files the certified eligibility list and forwards it to the City Manager to make the requisite appointments. If any candidate on the eligibility list is entitled to the soldiers preference, the City Manager must select that candidate. Otherwise, the City Manager selects any candidate on the eligibility list without regard to their ranking by the Civil Service Commission. All candidates are interviewed by the Chief of the Fire Department and an order of selection is prepared for recommendation to the City Manager. The City Manager's practice is to select the candidate recommended by the fire chief.

10. The City, the DMFD and the Civil Service Commission hereafter shall continue to develop and utilize qualifications and selection criteria for hire, assignment, transfer and promotion within the DMRD which have no adverse impact on blacks or which have been validated in accordance with Title VII, and with the *Uniform Guidelines on Employee Selection Procedures* issued pursuant

thereto, 28 C.F.R. 50.14, 29 C.F.R. 1607, 31 C.F.R. 51.53 (hereinafter referred to as the "*Uniform Guidelines*") or successor guidelines.

11. Except as otherwise provided in paragraphs 12 through 15, *infra*, the City shall continue to use the 1982 selection process procedures, qualifications and selection criteria for the position of fire fighter with the DMFD and shall continue to provide each applicant who is not certified with a written statement of his or her test performance and rank which served as the basis for non-selection. However, no such qualification or selection criterion shall constitute a valid basis or defense for the City's failure to meet the recruitment objectives set forth in paragraphs 16-18, *infra*, or the hiring goals set forth in paragraphs 19-20, *infra*. Further, the entry of this Decree shall in no manner indicate the approval, acquiescence or acceptance of any of the City's methods of selection if such method is utilized in a discriminatory fashion or has a discriminatory impact.

12. The plaintiffs and the Civil Service Commission do not agree as to whether the written examination is a job-related basis for selection for the position of fire fighter in the DMFD. The Civil Service Commission is of the view that the U.S. Civil Service Commission criterion-related validity study completed in 1975 demonstrates that Personality Research Form-A, published by Research Psychologist Press, Inc., Port Huron, Michigan, using the scoring key and minimum passing score of 21 resulting from the study, is a job-related basis for selecting fire fighters. The plaintiffs are of the view that such written test has not been validated in accordance with the *Uniform Guidelines* or otherwise shown to be job-related. However, the parties agree that the use of the written test is lawful if that use does not have an adverse impact on

blacks in recruitment or in selection. Accordingly, the parties agree that the Civil Service Commission shall continue to administer to applicants said written examination, *provided* that: a) the examination continues to be scored on a pass-fail basis using a minimum score no higher than 21 as the minimum passing score, b) applicants' written examination scores continue not to be used in any other fashion in evaluating applicants for ranking and continue not to be provided to the Civil Service Commissioners prior to their final ranking and certification of the applicants or to the City Manager and fire chief prior to the selection of applicants from the original or reserve eligibility lists. Such examination shall not be a defense should the City fail to meet the interim hiring goals set forth in paragraphs 19-20, *infra*, or the recruitment objectives set forth in paragraphs 16-18, *infra*.

13. The Civil Service Commission shall continue its present policy under which there are no background factors which are automatically the basis for disqualification. Under the Commission's policy, arrests, convictions, military discharges that are less than honorable, poor credit ratings or no credit ratings at all, do not constitute automatic reasons for rejection of an applicant for the position of fire fighter with the DMFD. However, the Civil Service Commission may inquire into the circumstances underlying such matters as a part of its oral examination process.

14. The Defendants, their agents, employees, representatives, and successors, shall actively encourage all blacks who are presently employed or who may subsequently be employed as fire fighters pursuant to this Decree to seek promotion when eligible and shall apprise all black employees of the promotional opportunities avail-

able in the department as well as the study aids and any other assistance available to fire fighters interested in developing their promotional potential and maximizing their promotional possibilities.

15. In evaluating applicants, defendants shall utilize the standards and procedures in a manner nondiscriminatory in purpose and effect and consistent with achieving the interim hiring goals set forth in paragraphs 19-20, *infra*. In the event that the defendants intend to modify any qualification or standard for hiring or promotion subsequent to August 24, 1982, the defendants shall, thirty (30) days prior to the implementation of such modification, notify plaintiffs in writing of the content of such intended modification. In the event that the plaintiffs have objections to any proposed modification, and the parties are unable to reach agreement, the Court shall promptly set the matter for hearing and resolution prior to implementation of the proposed modification. The parties agree that the setting of a hearing shall operate as a stay in implementation of the modification until the Court resolves the matter.

III

AFFIRMATIVE RECRUITMENT REMEDY

16. The Civil Service Commission shall establish a fire fighter application period which is not shorter than six (6) weeks for each selection process.

17. The Civil Service Commission shall continue its active recruitment program directed toward increasing substantially the numbers of qualified black applicants for the position of fire fighter in accordance with the purpose and objective of this Decree, as set forth in paragraph 1, *supra*.

18. Such recruitment program shall be on an active and continuing basis and shall include, but need not be limited to:

a. The placement through television, radio stations and newspapers, including radio stations and newspapers which primarily serve or are directed toward the black community, of advertisements which:

1. Emphasize that the DMFD is an Equal Employment Opportunity employer;

2. Emphasize the City's active and continuing recruitment program on behalf of blacks for the position of fire fighters in the DMFD;

3. Emphasize the affirmative hiring relief requirde by this Decree;

4. Summarize the qualifications required for fire fighter applicants;

5. Provide information as to the method by which application for the position of fire fighter must be made, as well as the dates during which application must be made; and

6. Invite blacks to apply for the position for fire fighter, and state the name, address and telephone number of the unit of the DMFD or the Civil Service Commission to which inquiries and requests for application may be made.

b. The preparation, the prominent placement in all City buildings and the distribution (especially within the predominantly black community) to colleges, high schools, technical schools, churches, community groups and places of business, of brochures and posters which contain the information and emphasis required in the

media advertisements set out in subparagraph 18a, *supra*.

c. The continued recruitment for the position of fire fighter with the DMFD of blacks enrolled at colleges in the Des Moines metropolitan area, including the Des Moines Area Community College, and at Des Moines area high schools and technical schools with black enrollments.

d. Continued contacts with and visits to local offices of groups and associations which specifically serve or promote the employment opportunities of blacks (e.g., the NAACP and the Willkie House) to inform them of the City's active and continuing recruitment program on behalf of blacks for the position of fire fighter in the DMFD;

e. The continued solicitation of, acceptance and processing of interest cards from blacks who indicate an interest in making application, at any time, regardless of the date of the next examination period, and immediate notification of the application period to those who fill out interest cards;

f. The wide distribution of interest cards to those schools, churches, and groups and associations referred to in subparagraphs 18b, c and d, *supra;* the timely forwarding during the application period of application forms to all blacks who request them; and follow-up efforts (personally and/or by mail) with all blacks to whom applications have been provided.

g. The continued maintenance of regular contact by the City's EEO Administrator with all black applicants throughout the selection process, including, in those instances in which an applicant is not selected by the Civil Service Commission and the applicant so re-

quests, assistance in obtaining an explanation of the Commission's written notice of non-selection.

IV

INTERIM HIRING SYSTEM

19. In determining whether this Decree's purpose and intent of remedying the present effects of the City's alleged prior discriminatory practices has been achieved, the defendants agree (without admitting that any such standard is legally required) to use as a standard of comparison the proportion of blacks who reside in the City of Des Moines and agree to undertake as the long-term goal of this Decree, subject to the availability of qualified applicants, achieving a 6.8% proportion of blacks in the uniformed job classifications within the Des Moines Fire Department. For the purposes of this Decree "uniformed" refers to all DMFD personnel performing non-clerical functions. In meeting this long-term goal the defendants shall adopt an interim goal, measured on an annual basis from the date of this Decree, in filling vacancies within the DMFD. For the entry level uniformed position of fire fighter, the interim goal shall be to fill at least fifty percent (50%) of all vacancies with qualified black applicants until the departmental goal of a 6.8% black uniformed work force is met.

For purposes of determining compliance with the interim and long-term goals, persons who fail to complete probation shall not be counted as having been appointed. The interim goal for blacks shall continue in effect until the long-term goal for the Department of a uniformed work force that is 6.8% black has been achieved and maintained for a period of one (1) year.

20. Until such time as the hiring goals set out in paragraph 19 are met, defendants, their agents, employees

and successors, shall make appointments to the entry level of fire fighter in the following manner:

a. After the conclusion of the selection process, the Civil Service Commission shall certify an original eligibility list of ten (10) qualified candidates which includes two (2) sublists of five (5):

1. One sublist shall consist of the five (5) highest ranked black candidates, ranked in order of their numerical scores upon completion of the selection process. If a tie occurs in the examination process which would qualify a person for the fifth position on the sublist of black candidates, the sublist shall include all blacks who qualify for the fifth position.

2. The second sublist shall consist of the five (5) highest ranked nonblack candidates, ranked in order of their numerical scores upon completion of the selection process. If a tie occurs in the examination process which would qualify a person for the fifth position on the sublist of nonblack candidates, the sublist shall include all nonblacks who qualify for the fifth position.

The Civil Service Commission shall, at the conclusion of each selection process, file a report with the Court with a copy to plaintiffs as to the racial makeup of the pool of applicants and of the persons selected for certification.

b. Appointments shall be made by the City Manager by selecting alternately one (1) person from the sublist of qualified black candidates and one (1) person from the sublist of qualified nonblack candidates. Should a candidate entitled to the soldiers preference (Iowa Code section 400.10) qualify for either sublist,

that candidate will be preferred over all non-veteran candidates on that sublist. Therefore, any black whose ranking qualifies him or her for placement on the sublist of five (5) and whose military service entitles him or her to the soldiers preference shall be preferred in appointment over non-veterans on the sublist of blacks. Similarly, any nonblack whose ranking qualifies him or her for placement on the sublist of five (5) and whose military service entitles him or her to the soldiers preference shall be preferred in appointment over non-veterans on the sublist of nonblacks. *Provided,* however, that said soldiers preference shall in no way affect the alternating one-black-for-one-nonblack interim appointment procedure.

c. If the list of ten (10) persons provided in paragraph 20a is exhausted within one (1) year, and the Civil Service Commission elects to establish a reserve eligibility list, the Commission shall certify a second list of qualified candidates which includes two sublists of equal numbers of black candidates next highest in standing and nonblack candidates next highest in standing. Appointments shall be made by alternately selecting one (1) person from the sublist of qualified black candidates and one (1) person from the sublist of qualified nonblack candidates, as described in paragraph 20b.

d. In the event that a person on either sublist comprising the initial certified list turns down an offer of appointment, a person from the same sublist shall be offered that appointment. Should the person declining the appointment be the last person from his or her sublist the Commission shall certify a reserve list pursuant to paragraph 20c, above, and the appointment shall be offered to a person from the identical

racial sublist included in the reserve certified list. In the event that all names on either sublist are exhausted, including those on the sublists which comprise a reserve list, the City may make appointments from the names on the unexhausted sublist.

V.

REMEDIAL RELIEF FOR INDIVIDUAL BLACKS

21. In settlement of all of the claims of the plaintiffs for remedial relief on behalf of individual blacks alleged to have been the victims of a pattern or practice of discrimination against blacks with respect to job opportunities in the Des Moines Fire Department, except as to the claims of individual class members which are governed by the provisions of paragraph 22, *infra*, defendants agree, and it is hereby ordered that:

a. The City shall make all entry level fire fighter positions coming open after the exhaustion of the 1982 selection process reserve list available first to the plaintiffs, named and class, who can affirmatively show that their application and participation in any post-1972 selection process, if scored in the manner utilized in the 1982 selection process, would have placed them on either the original eligibility list or the reserve list in the particular process in which they participated. Such relief shall be conditional only upon: the timely filing by each such individual of his or her intent to make such showing and to claim such relief, the successful completion of the medical examination, and successful evaluation of the background report on the individual's activities for the period of time following the original application to the present. Notwithstanding the requirement that

each applicant pass the medical examination, defendants shall not disqualify any individual because of a medical condition now in existence which was not in existence at the time of that person's initial application unless the defendants can clearly establish that incumbent fire fighters who develop the same condition are by reason of such condition dismissed from the Des Moines Fire Department.

This individualized relief shall be afforded each black applicant who was not offered an appointment as a fire fighter despite having passed all examinations and having satisfied all other selection criteria applicable in that selection process and having achieved a raw score on the oral examination conducted by the Civil Service Commission which would have qualified him or her for either the original eligibility list of ten (10), or the reserve list of ten (10) if such a list was certified, had eligibility been determined based on the oral examination score alone.

1. The plaintiffs shall, within thirty (30) days from the date of entry of this Decree, provide defendants with a list of the individuals, including their respective mailing addresses, who they believe are entitled to such relief. Thereafter, the plaintiffs and defendants shall have fifteen (15) days within which to seek to agree as to whether each person named by the plaintiffs meets the prescribed criteria for individual relief. If after such fifteen (15) day period the plaintiffs and defendants are unable to reach agreement as to whether each person named by the plaintiffs meets the prescribed criteria, then as to any disputed person the Court, after an evidentiary hearing, shall decide.

2. Defendants shall provide each of the individuals determined to be entitled to relief with a notification which summarizes the relief to which he or she is entitled pursuant to this Decree and requests that he or she advise defendants as to whether he or she desires to be considered for appointment as a fire fighter in the Des Moines Fire Department. The form of notification shall be that which is attached to this Consent Decree as Exhibit "A".

3. Defendants' notification to each of these individuals shall be accompanied by a copy of this Decree and shall be sent by certified mail, return receipt requested, not more than five (5) days after agreement is reached between the parties, or decision is rendered by the Court, as to the entitlement of each of these persons to relief pursuant to the procedure required by subparagraph 1, *supra*. Such notification shall also state that if the recipient has any questions, he or she may contact either of the following counsel for the plaintiffs or the defendants:

Gregory L. Biehler
Smith, Schneider & Stiles, P.C.
4717 Grand Avenue
Des Moines, Iowa 50312
Attorney for Plaintiffs

Nelda Mickle
City Solicitor
City Hall
East 1st & Locust Street
Des Moines, Iowa 50307
Attorney for Defendants

Notification by certified mail, return receipt requested, to the individual at his or her last known address complies with this paragraph. Costs of such notice will be borne by the defendants.

4. Each person shall have thirty (30) days from the date of the City's deposit in the U.S. mail, as determined by the U.S. Post Office, Receipt of Mailing Certificate, to advise defendants in writing as to whether he or she desires to be considered for appointment as a fire fighter in the DMFD. If he or she advises defendants in writing within such thirty (30) days of his or her desire to be considered for appointment, the City shall provide a current application form and upon receipt of such completed form shall proceed in accordance with paragraphs 21a(5) and (6), *infra*. If, however, he or she either advises defendants that he or she does not desire to be considered for appointment or, absent good cause, fails to advise defendants within such thirty (30) days as to whether he or she desires to be considered for appointment, defendants are released from their obligations under this Consent Decree.

5. Should the Civil Service Commission reach an adverse decision on any individual based on the medical examination or the background investigation, the matter shall be immediately set for hearing before the Court at plaintiff's request. Defendants shall have the burden of demonstrating to the Court, by clear and convincing evidence, that any individual rejected on the basis of the medical examination or the background investigation failed to meet the 1982 selection process standards (as qualified by this paragraph 21a with

regard to any medical condition occurring subsequent to the original application).

6. Defendants shall appoint as a fire fighter each person who establishes his or her entitlement to relief pursuant to paragraph 21a(1-5), provided that such person accepts the defendants' offer of appointment. In the event there are insufficient vacancies to immediately appoint every individual qualifying for relief under paragraph 21a(5), appointments shall be made in the order of each person's ranking in his or her selection process (based on the oral interview score alone), *provided*, however, the soldiers preference will be granted any person who so qualifies. Should qualifying individuals have the same rank in different selection processes, the person in the earliest selection process shall receive the first appointment. Any qualifying individual who does not receive an appointment immediately upon qualification shall be fully compensated with the salary, pension, and all of the emoluments of the rank of fire fighter, including seniority credit, until the appointment is made, less any salary or other wages earned by said individual during this interim period. Every qualifying individual who is appointed shall be provided with all of the emoluments of the rank of fire fighter, including retroactive seniority, for all persons in that rank, as of the date by which they reasonably would have been appointed as fire fighter absent the defendants' alleged unlawful failure to have appointed them.

b. The City shall consider for appointment to the entry level fire fighter position in the next selection

process the plaintiffs, named and class, who can affirmatively show either that their application and withdrawal from any post-1972 selection process or their failure to apply to any such selection process was due to their perception that application was futile. Such relief shall be conditional only upon demonstration that the person would have satisfied the minimum qualifications required for such application (as set forth in paragraph 6) in the year in which he or she would have made application, and the timely filing by each such plaintiff of his or her intent to make such showing and to claim such relief. The individualized relief authorized is limited to the opportunity to compete upon an equal footing with all other candidates in the next selection process, which, pursuant to this Decree, shall be scored as in the modified 1982 selection process. Individuals qualifying for relief under this subparagraph 21b who are subsequently appointed as a fire fighter are not entitled to back pay, front pay, or retroactive seniority.

1. Defendants shall provide personal notice to those identifiable individuals who made application for fire fighter and thereafter withdrew or failed to show up for a subsequent stage of the selection process. The form of the notification shall be that which is attached to this Consent Decree as Exhibit "B". In all other respects, notification under this subparagraph shall be made in accordance with the provisions of paragraph 21a(3).

2. Defendants shall provide notice by publication to those individuals who cannot be personally identified but who may have failed to make application for fire fighter because of their belief

that such an application would have been futile. Notification to such individuals shall be in the form set out in Exhibit "C" to this Consent Decree. It shall be published in 10-point type in three (3) consecutive Sunday editions of the Des Moines Register and in three (3) consecutive weekly editions of the Iowa Bystander, with the first publication occurring not more than ten (10) days after entry of this Decree. Such notification shall also state that if a person has any questions, he or she may contact either of the following counsel for the plaintiffs or the defendants:

Gregory L. Biehler
Smith, Schneider & Stiles, P.C.
4717 Grand Avenue
Des Moines, Iowa 50312
Attorney for Plaintiffs

Nelda Mickle
City Solicitor
City Hall
East 1st & Locust Street
Des Moines, Iowa 50307
Attorney for Defendants

Costs of such notice will be borne by the defendants.

3. Each person shall have thirty (30) days from the deposit of such notice with the U.S. Post Office as set out in paragraph 21a(4) of this Decree or from the date of the third published notice, whichever is applicable, to advise defendants as to whether he or she intends to claim entitlement to re-application or application under this paragraph. If such person either advises defendants

that he or she does not desire to apply or, absent good cause, fails to advise the defendants within the applicable time period as to whether he or she claims entitlement to relief, defendants are released from their obligations to him or her under this Consent Decree.

4. Immediately upon receipt of a claim filed pursuant to paragraph 21b(3), Defendants shall provide plaintiffs' counsel with a copy of the claim, the claimant's address and telephone number and shall assist the claimant in contacting plaintiffs' counsel. Within thirty (30) days of the final closing date for submission of claims under paragraph 21b(3), plaintiffs' counsel shall evaluate all claims filed and shall submit the claims in documentary form to the defendants. Defendants shall evaluate the claims and shall advise plaintiffs' counsel and each claimant within fifteen (15) days as to defendants' determination as to whether he or she meets the prescribed criteria for individual relief under paragraph 21b. Any claim rejected by defendants must be submitted within thirty (30) days from the mailing by certified mail, return receipt requested, of defendants' notice of rejection to both the claimant and plaintiffs' counsel to the Court for determination. In the event that plaintiffs' counsel concurs with a determination of defendants that a claimant does not have a claim for which relief can be granted, plaintiffs' counsel shall advise said claimant of his or her right to retain counsel or to proceed pro se and to bring his or her claim before the Court for resolution. The individual claiming entitlement to relief shall have the bur-

den of demonstrating to the Court, by the preponderance of the evidence, that he or she meets the criteria set forth in paragraph 21b, *supra*.

22. a. 1. Any black person who has a charge of racial discrimination pending before the Equal Employment Opportunity Commission against defendants as to the DMFD fire fighter selection process may, should he or she qualify for individual relief under paragraph 21, with the filing of a dismissal with prejudice of such charge, elect the individual relief available under this Decree; however, should such person not qualify for relief under paragraph 21, he or she, upon request, shall have his or her claim set for prompt hearing before this Court pursuant to the Court's retained jurisdiction. Unless such an individual qualifies and elects the individual relief available under this Decree or requests a prompt hearing of his or her claim, the person's claim shall be severed.

2. Defendants shall provide each black person who has a pending charge with a notification which summarizes the individual relief available under this Decree and requests that he or she advise the Court as to whether the person intends to claim relief under the Decree, or intends to file a Complaint and have his or her claim scheduled for prompt hearing by the Court, or intends to have his or her claim severed completely from this suit. The form of notification shall be that which is attached to this Consent Decree as Exhibit "E." Defendants' notification to each of these individuals shall be accompanied by a copy of this Decree and shall be sent by certified mail, return receipt requested, not more than five (5)

days after entry of this Decree. Each person shall have thirty (30) days from the date of the City's deposit in the U.S. mail, as determined by the U.S. Post Office, Receipt of Mailing Certificate, to advise the Court in writing as to whether he or she claims relief under the Decree, or intends to file a Complaint and have his or her claim set for prompt hearing by the Court, or intends to have his or her claim severed completely from this action.

3. Each person who timely requests a prompt hearing pursuant to paragraph 22a(2) shall immediately request the issuance of a Notice of Right to Sue letter from the EEOC, if none has been issued. Within twenty (20) days from the closing date for filing requests for prompt hearing or the person's receipt of his or her Notice of Right to Sue letter, whichever is later, the person shall file, without payment of a filing fee, a Complaint with the Clerk of Court under the docket number of this cause. The Complaint shall comply with Rule 8, *Federal Rules of Civil Procedure*, and shall be served on counsel for defendants and, in the event that plaintiffs' class counsel does not represent the individual claimant, upon plaintiffs' class counsel. The City shall file an Answer to each Complaint within twenty (20) days. Discovery with regard to each individual claim shall be closed sixty (60) days from the date of the filing of the individual's Complaint. The deadline for the filing of dispositive motions, such as a motion for summary judgment or motion to dismiss, shall be ninety (90) days from the date of the filing of the individual's Complaint. Each individual case shall be placed on the Court's trial calendar

and the parties shall be ready for trial no later than one hundred twenty (120) days from the date of the filing of the individual's Complaint.

b. This Decree does not adjudicate any claim for individual relief based on defendants' 1982 selection process which is first asserted after entry of this Decree.

23. Upon entry of this Decree, plaintiffs shall be given all reasonable access, for purposes of inspection and copying, to the personnel records of the defendants relating to the selection of fire fighters, for the purpose of identifying persons who may qualify for individual relief under paragraph 21, *supra*. Such review shall be completed within twenty (20) days of entry of this Decree.

VI

REPORTING AND RECORDKEEPING

24. The City of Des Moines shall file with the Court with a copy to plaintiffs the portion of its quarterly Affirmative Action Report which covers the DMFD, within five (5) days of its submission to the City Council.

a. Notation shall be made directly upon the Utilization Analysis Report for the DMFD, included in the quarterly Affirmative Action Report, of the full name, race, national origin, sex, rank, date of appointment of each person 1) hired, discharged or involuntarily terminated by the DMFD during the quarter, 2) who successfully completed drill school during the quarter, 3) who achieved permanent status, that is, completed probation, during the quarter, and 4) promoted during the quarter as well as such employee's former and new rank, former and new station or command, and date of promotion.

b. With respect to discharges or involuntary resignations, the report shall include the full name, race, national origin and sex of each employee who, during the quarterly period, was involuntarily terminated or who resigned from a uniformed position with the DMFD, the rank or job from which terminated, the date of termination and the precise reason(s) therefor.

c. In the event the City should fail to file the quarterly Affirmative Action Report within 15 days past the end of each quarter (March 31, June 31, September 31, December 31), the City shall file a separate report with the Court with a copy to the plaintiffs containing the foregoing information.

25. At the conclusion of each Civil Service selection process, whether for entry level or promotional fire department positions, the Civil Service Commission shall file with the Court, with a copy to plaintiffs, the Equal Employment Opportunity Survey Analysis (form attached hereto as Exhibit "D") for such process. Such EEO Survey Analysis shall provide a numerical breakdown by race, national origin and sex as to the total number of persons who made application for the position as well as the number of persons who passed and failed, respectively, any qualification or criteria used by the City during that quarterly period.

26. The City shall retain for the duration of this Decree, and shall make available to the plaintiffs for inspection and copying upon written request, all documents pertaining to the recruitment, selection, hire, assignment, transfer, promotion, demotion, discipline and termination of all personnel in the DMFD. In addition, the City shall furnish reports and information to the plaintiffs as needed pertaining to the City's compliance with this Decree.

VII

COMPLIANCE WITH THIS DECREE

27. The City's Equal Opportunity Administrator shall be responsible for coordinating and overseeing the City's compliance with this Decree.

28. The plaintiffs hereby designate the following individual as their Compliance Officer for the administration and enforcement of this Decree:

Russell E. Lovell, II
3111 40th Place
Des Moines, Iowa 50310
(515) 271-2952
Attorney for Plaintiffs

If the plaintiffs subsequently change their Compliance Officer, they shall promptly notify the City as to the name, title, mailing address and business telephone of that Officer's successor.

VIII

RETENTION OF JURISDICTION

29. This Court shall retain jurisdiction of this action for the purpose of entering all orders, judgments and decrees which may be necessary or appropriate to effectuate the purposes of this Decree and to implement the relief provided herein, in conformance with the City's obligations under Title VII, Title VI, and the Revenue Sharing Act. Specifically, jurisdiction shall be retained until the long-term goal for the DMFD, as set forth in paragraph 19, has been achieved and maintained for a period of one (1) year. In addition, in the unanticipated event of layoffs of fire fighters by the City, the Court

shall allow plaintiffs to move to modify this Decree so that blacks hired pursuant to the hiring relief provided in this Decree will not be disproportionately affected by such layoffs.

30. In the event the entry of this Consent Decree generates, either through intervention or separate, collateral lawsuits, attacks on the appropriateness or sufficiency of any of the provisions contained herein, including actions claiming entitlement to damages against the City as a result of the ordering of any of the affirmative relief contained in this Decree, the parties hereto agree and warrant that they shall defend the lawfulness of any provision or provisions so attacked. The parties believe that the remedial actions and practices required by this Decree do not constitute unlawful discrimination within the meaning of any provision of the Constitution of the United States or of any federal statute, rule, regulation, executive order or other source of federal law, or of any provision of the Constitution of the State of Iowa or of any statute, rule, regulation, executive order, ordinance or other source of law. If any such collateral lawsuit arises in state court against the defendants, the City shall seek to remove such action to the federal district court.

31. If any provision of this Decree causes a result unintended by all the parties or an ambiguous interpretation, the aggrieved party shall notify the other parties by mail of the unintended result or ambiguous interpretation. The parties shall have 30 days after the date of such letter to resolve the problem. If the parties are unable to reach agreement within such 30 days, the issue may be submitted to the Court for resolution.

IX

COSTS AND ATTORNEYS' FEES

32. The City shall pay the costs, expenses, and disbursements incurred by the plaintiffs in the prosecution of this action.

33. Counsel for the plaintiffs are entitled to reasonable attorneys' fees as part of the costs. The parties have followed the recommendation of *Prandini v. National Tea Co.*, 557 F.2d 1015 (3d Cir. 1977) that the remedies aspect of the case should be settled separately from the award of statutorily authorized attorneys' fees and that only after approval of this Decree by the Court should discussion and negotiation of appropriate compensation for plaintiffs' attorneys begin. The parties, therefore, have not attempted to negotiate as to the amount of fees to which plaintiffs' counsel are entitled. Plaintiffs' counsel, of course, do not waive their entitlement to attorneys' fees. In the event the parties cannot reach agreement as to the amount of the attorneys' fees award, the matter shall be submitted to the Court for its resolution after an evidentiary hearing. The same procedure shall be used to ascertain the amount of the attorneys' fees award due plaintiffs' counsel for the work done implementing the remedial provisions of this Consent Decree.

X

NOTICE

34. Notice required to be given to plaintiffs or defendants by this Decree shall be placed in the United States mail, or personally delivered, addressed to:

Plaintiffs

Gregory L. Biehler
Smith, Schneider & Stiles, P.C.
4717 Grand Avenue
Des Moines, Iowa 50312
Russell E. Lovell, II
3111 40th Place
Des Moines, Iowa 50310
(515) 271-2952

Defendants

Nelda Mickle
City Solicitor
City Hall
East First & Locust Streets
Des Moines, Iowa 50307

35. The Court hereby gives its tentative approval to this Consent Decree, subject to the notification of class members and the provision of an opportunity for them to file objections and/or to opt out of the settlement. This notice shall be mailed to each identified class member by registered mail and shall in addition be published in the Des Moines Register and the Iowa Bystander, newspapers of general circulation within the Des Moines, Iowa geographic area. Costs will be borne by the defendants. Any class member who wishes to object to the entry of the Decree or to opt out of the settlement must file in writing his or her objection or opt out notice with James Rosen-

baum, Clerk, United States District Court, United States Court House, East First and Walnut Streets, Des Moines, Iowa 50309; any such objection or notice shall be filed within thirty (30) days of mailing or publication, whichever is later. If a written objection is filed, the Court may hold a hearing as to the fairness and adequacy of the Decree should the Court conclude that the objection warrants such consideration. If no written objections are filed within thirty (30) days of mailing or publication, whichever is later, this Consent Decree shall become final without further action by the Court.

ENTERED, this ..... day of ....., 1983.

.....

The Honorable Harold D. Vietor, United States District Court Judge

APPROVED:

.....	.....
Philip T. Riley, Corporation Counsel	Russell E. Lovell, II
.....	.....
Nelda Barrow Mickle, City Solicitor Attorneys for Defendants	Gregory L. Biehler Attorneys for Plaintiffs

/clc

8/30/83

August 31, 1983

The Honorable Mayor

and

Members of the City Council

At the August 30, 1983 meeting of the Des Moines Civil Service Commission, the following motion was adopted:

Moved that the Civil Service Commission approve the proposed consent decree to be taken to the Des Moines City Council for approval and then to the United States District Court.

The Commission believes that the Consent Decree is in the best interest of both the City of Des Moines and the plaintiffs and urges the City Council to approve its adoption.

Respectfully submitted,

/s/ R. V. Sipfle
R. V. Sipfle

Civil Service Administrator

August 2, 1985

Robert D. St. Vrain
Clerk of U.S. Court of Appeals
For the 8th Circuit
U.S. Court & Custom House
1114 Market Street
St. Louis, MO 63101

Re: *Moore v. City of Des Moines, Iowa, et al*
No. 81-2514 SI

Dear Sir:

Undersigned counsel for the City of Des Moines and Civil Service Commission, defendants in the above captioned case, have just become aware of the recent United States Supreme Court decision in *Marek v. Chesny*, 53 USLW 493 (June 27, 1985), which should be brought to the attention of the Court in its consideration of the petition for rehearing en banc.

We are forwarding twelve copies of the *Marek v. Chesny*, decision and respectfully request that a copy of the decision and this letter be placed with each copy of Appellant's Petition for Rehearing En Banc previously filed with the Court.

Sincerely,

/s/ Philip T. Riley
Philip T. Riley
Corporation Counsel
/s/ Nelda Barrow Mickle
Nelda Barrow Mickle
City Solicitor
Attorneys for Defendant/
Appellants

PTR/NBM:crn

cc: (with enclosure)

Russell E. Lovell, II
Gregory Biehler
3111 40th Place
Des Moines, IA 50310

Robert A. Wright
Wright & Wright
621 Midland Financial Building
Des Moines, IA 50309

Thomas I. Atkins
Margrett Ford
NAACP Special Contribution Fund
186 Remsen Street
Brooklyn, NY 11201

Dwight W. James
Roxanne Barton Conlin
James & Galligan, P.C.
610 Equitable Building
Des Moines, IA 50309

Supreme Court, U.S.
FILED
DEC 13 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-842

In the Supreme Court of the United States

OCTOBER TERM, 1985

CITY OF DES MOINES, IOWA, et al.,
Petitioners,

vs.

DENNIS A. MOORE, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ROXANNE BARTON CONLIN
(Counsel of Record)
JAMES AND GALLIGAN, P.C.
610 Equitable Building
Des Moines, Iowa 50309
(515) 282-3333

RUSSELL E. LOVELL, II
3111 40th Place
Des Moines, Iowa 50310
(515) 271-2952

Attorneys for Respondents

BEST AVAILABLE COPY

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED FOR REVIEW

1. Whether the court of appeals' affirmance of the district court's calculation of attorney's fees was erroneous when (a) the relief obtained was identical to the "essentially complete relief" of *Davis v. County of Los Angeles*, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974), recognized by this Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and by the legislative history of the Civil Rights Attorney's Fees Award Act as the benchmark for a fully compensatory lodestar fees award; and (b) the evidence as to both prevailing market rates and the reasonableness and necessity of the hours expended was uncontradicted.

2. As a question raised for the first time in this case, does *Marek v. Chesny*, ... U.S. ....., 105 S.Ct. 3012 (1985), have any application to a class action pattern and practice case settled by Consent Decree and Stipulation prior to trial when (a) the Petitioners failed to make a valid offer of judgment under Rule 68; (b) the relief obtained by Respondents was more favorable than either of Petitioners' "offers"; and (c) the Revenue Sharing Act, an independent jurisdictional basis for al' the relief obtained, authorizes an award of "a reasonable attorney's fee" to the prevailing party but does not define fees as "costs" in the fee-shift statute.

3. Whether the court of appeals' affirmance of the district court's award of $15,237 in fees for legal services provided in the prosecution of Respondents' fee application, which resulted in a fees award of 96% of the requested merits lodestar, was error.

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No. 85-842

In the Supreme Court of the United States

OCTOBER TERM, 1985

CITY OF DES MOINES, IOWA, et al.,
Petitioners,

vs.

DENNIS A. MOORE, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATUTORY PROVISIONS INVOLVED

1. The State and Local Fiscal Assistance Act of 1972, as amended (Pub. L. 97-258, Sept. 13, 1982, 96 Stat. 1028), codified at 31 U.S.C. § 6721(c):

> In an action under this section, the court—
>
> * * *
>
> (2) to enforce compliance with section 6716(a) or (b) of this title, may allow a prevailing party (except the United States Government) a reasonable attorney's fee.

STATEMENT

Petitions such as this, by losing defendants

> . . . must be one of the least socially productive types of litigation imaginable: appeals from awards of attorney's fees, after the merits of a case have been concluded, when the appeals are not likely to affect the amount of the final fee. Such appeals, which greatly increase the costs to plaintiffs of vindicating their rights, frustrate the purposes of § 1988.

Hensley v. Eckerhart, 461 U.S. 424, 442 (1983) (Brennan, J., concurring in part and dissenting in part), quoted with approval in *Webb v. Board of Ed. of Dyer County, Tenn.,* ..... U.S. ....., 105 S.Ct. 1923, 1929 n.19 (1985). Appeals seeking to relitigate factual issues also waste valuable judicial resources. It was this latter concern, coupled with Petitioners' misconception of the appellate court's judicial review power in attorney's fees litigation, that caused the Eighth Circuit to exercise its supervisory authority in the instant case:

> Our concern centers on the large number of cases on our docket alleging an abuse of the district court's discretion which are based simply on the amount of an attorneys' fee award. Such appeals often lack substance and hinder the prompt disposition of more meritorious appeals. The dockets of all federal courts are overcrowded. We suggest to the bar and to individual counsel that as officers of the court, lawyers have a responsibility in limiting litigation over attorneys' fees.

* * *

> Appeal of the district court's fee determination should be taken only where the district court allegedly has misapplied the applicable law. Appeals contending that the district court abused its discretion in determining the amount awarded ordinarily do not require oral argument and will be decided without argument by a three-judge screening panel. If the court holds an appeal is frivolous and not brought in good faith, the court may properly exercise sanctions relating to costs and attorneys' fees.

Moore v. City of Des Moines, 766 F.2d 343, 346 (8th Cir. 1985). A.5-A.6.

1. Litigation of the Merits.

The Petitioners' mischaracterization of the factual record is too extensive to fully correct in this short brief. Petitioners have argued that this was a "relatively simple case which was overprepared," that they "urged" the filing of the suit, and that they embraced the affirmative hiring relief contained in the final decree, and that therefore Respondents' fees award should be modest because they obtained no "uncontested" relief. The view that the litigation was a "mutually cooperative effort" is a revisionist picture commonly painted by defendants in fees litigation, and commonly rejected by the courts which presided over the litigation. *See, Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (en banc); *White v. City of Richmond*, 559 F. Supp. 127 (N.D. Cal. 1982), aff'd, 713 F.2d 458 (9th Cir. 1983). The district court which presided over the instant case expressly repudiated Petitioners' factual contentions, and concluded:

> "This case was difficult and complex civil rights class action litigation. It necessarily required the expen-

diture of a great deal of time by plaintiffs' lawyers, and under the circumstances of the case several lawyers were necessary." A.9.

The settlement of the instant case was the product of negotiations similar to the 11-month negotiations that resulted in a consent decree in *White, supra,* where the district court found that "counsel, in addition to their efforts to achieve settlement, were forced simultaneously to prepare their cases for trial, because despite conscientious and well-intentioned efforts on the part of the attorneys for both plaintiffs and defendants, settlement was far from assured." 559 F.Supp. at 130.

Petitioners would mislead the Court with the numerous allegations that "the City" sought to utilize the case to further the integration of the fire department. Cert. Pet. at 3. What the facts show is that "the City" did not speak with one voice. Respondents' counsel met with Petitioners' counsel in March 1982, and, even though Petitioners' counsel only had authority from the Civil Service Commission (CSC) (S.App. 233, 322),[1] Respondents offered to pursue negotiations toward a consent decree. (S.App. 222, 324-325) It became apparent that some of the 27 defendants were less interested in settlement than others, and that certain vital defendants, including city council members and the fire chief, had deep reservations about affirmative action hiring relief. Nonetheless, negotiations began early, and by January 5, 1983,

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1. Respondents have elected not to burden this Court with testimonial evidence from the evidentiary hearing. Therefore, Respondents will cite to the record from the district court's hearing on fees as presented to the court of appeals in an Appendix (App.) and a Supplemental Appendix (S.App.), when documentation of fact is appropriate. Respondents' Appendix to this Brief includes only the Stipulation of the Parties, and will be cited "Resp.A."

the attorneys had negotiated, with client consultation, a detailed consent decree. (Ex. 11, S.App. 85-126) Respondents thought that a settlement had been achieved, but Petitioners responded with a dramatically different and a wholly inadequate counteroffer on February 14, 1983. A.30-A.36; see notes 10 and 11 *infra*, and accompanying text. Petitioners broke off further negotiations.[2] (S.App. 240)

Facing a discovery deadline of April 30, 1983 (S.App. 384, 240), Respondents proceeded to prepare for trial. (S.App. 241) Only after discovery had been completed and the case was trial ready did the Petitioners return, at the behest of the Respondents to the bargaining table. (S.App. 241) The final Consent Decree is essentially the January 5, 1983 Decree, plus an "opt out" provision severing individual claims for separate trial, which Respondents had offered to Petitioners eight months earlier. (Ex. 12, S.App. 127-130) Near the conclusion of the negotiations, an internal disagreement arose within the Des Moines NAACP (S.App. 241-243), which caused Respondents' class counsel, Lovell and Biehler, to seek the assistance of NAACP General Counsel Atkins and local

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2. The most likely inference is that the various Petitioners were deeply divided as to the terms upon which they would agree to settlement. The City Council's ultimate approval of the Consent Decree on September 6, 1983, was only by a vote of 4 to 3. A.43. The Civil Service Commission did agree to entry of a Consent to Temporary Restraint in August 1982, which required *certification* of one black for each nonblack. Contrary to Petitioners' representation, Cert. Pet. at 6, this relief was not double that sought by Respondents, who sought a preliminary injunction requiring Petitioners to *hire* one black for every two nonblacks hired. Certification is a crucial first step, but it does not ensure hiring. Certification is solely within the authority of the CSC; hiring is within the authority of the City Council, Fire Chief, and City Manager, and they were not bound by the August 1982 order.

NAACP counsel Wright. (S.App. 244-246, 337-339) Atkins and one of his assistants, Ford, and Wright worked with Lovell and Biehler during the months of August through December, 1983, to negotiate a Stipulation of the Parties which provided additional remedial protection and resolved the conflict within the plaintiffs' class. (S.App. 246-250, 340-345, App. 80-83) After a fairness and adequacy hearing, the district court entered final judgment on the Consent Decree on January 31, 1984.

2. Litigation of the Fees.

Consent Decree ¶ 33 provides that counsel for Plaintiffs are entitled to reasonable attorneys' fees. A.81. Settlement discussions with Petitioners did not prove fruitful. The District Court Judge, Harold Vietor, held a 1-day evidentiary hearing on July 6, 1984. Plaintiffs had the evidentiary burden and met that burden with testimony from Respondents' counsel Lovell and Biehler and complex litigation experts Ivan Bodensteiner and George LaMarca, the deposition of NAACP counsel Atkins, and affidavits from eleven Des Moines attorneys as to prevailing market rates and affidavits from eight attorneys with expertise in civil rights litigation as to the excellence of the results obtained and the reasonableness and necessity of the hours expended. Petitioners' evidence consisted of testimony by Earl Roberts, City Solicitor in March 1982 but who resigned his position in June 1982 before this litigation began, as to one conversation between himself and Respondents' counsel Lovell wherein each agreed to begin the process of seeking to negotiate a consent decree, and testimony by Reg Sipfle, City Civil Service Administrator, that the CSC hoped the suit could be resolved by consent decree and didn't believe it could engage in affirmative

action unless ordered by court decree. Petitioners also submitted affidavits of three Des Moines attorneys stating hourly rates they believed sufficient to attract competent counsel, but notably silent as to Des Moines market rates. Neither of Petitioners' attorneys, Mickle or Riley, who were in charge of this litigation from start to finish, testified or submitted themselves to cross-examination, though the City retained outside counsel to present its case.

The District Court issued a memorandum and order, and after discussing the standards of *Hensley* and *Blum v. Stenson*, 465 U.S. 886, 104 S.Ct. 1541 (1984), and their application to this case, awarded Plaintiffs fees and expenses as follows: $167,794.50 as a merits lodestar sum (reflecting a 100-hour reduction) and $10,739.69 in expenses; no enhancement for contingency or quality; and $15,030 as the lodestar on the fees litigation and $1,869.40 in expenses. The total award was $195,433.59. A.15. The Eighth Circuit quoted with approval the following critical findings of the District Court:

> This case was difficult and complex civil rights class action litigation. It necessarily required the expenditure of a great deal of time by plaintiffs' lawyers, and under the circumstances of the case several lawyers were necessary. (Footnote omitted.)
>
> * * *
>
> Under all of the circumstances, involvement of each lawyer was reasonably necessary. Each not only played a vital role, but each performed ably. The result is a detailed consent decree that is a very professional work product reflecting a high level of skill in the field of complex civil rights litigation.
>
> * * *

> [With the exception of 100 hours] all of the time expended by all of plaintiffs' lawyers, although extensive, was reasonable * * *.
>
> * * *
>
> The experience and abilities of each [attorney] justify the hourly rate each seeks.

766 F.2d at 344-345; A.2-A.3. Judge Vietor noted that "[t]he time spent litigating the fees issue is regrettable" and offered "to reconsider the amount of fees allowed for litigating the fee issue" if the fees award for work on the merits was "not significantly greater than the City offered in fee settlement negotiations". A.11. The City remained silent.

After briefing and oral argument, the Court of Appeals held: "The district court in this case has demonstrated an excellent grasp of these issues and standards [in *Hensley* and *Blum*]", 766 F.2d at 345, A.4, and did not abuse its discretion. The court quoted verbatim the eight issues which Petitioners raised in their appeal, A.3-A.4, and pointed out that only one issue could be characterized as legal. That issue, involving some hours spent on two individual claims which were severed from the class settlement but which were relevant to the pattern and practice relief obtained, was disposed of in a short footnote. 766 F.2d at 345 n.2; A.4 n.2. In rejecting Petitioners' other arguments, the court emphasized that "[t]he factual resolution of attorneys' fees cases [is] 'peculiarly within the competence of the district courts.'" 766 F.2d at 345; A.4. Indeed, it was Petitioners' misconception of the role of appellate courts in attorney fees litigation that caused the court to invoke its supervisory authority and instruct that appellate courts will not engage in *de novo* reviews of district court factual determinations.

REASONS WHY THE WRIT SHOULD BE DENIED

There are no substantial legal issues presented. The district court and the court of appeals correctly applied the fees standards developed by this Court in *Hensley* and *Blum*. The primary thrust of this Petition is a request for a *de novo* rehearing of the facts, a frivolous request which this Court, like the appeals court, should promptly decline.

1. Petitioners' first Reason for Granting Petition, and subsets 1(a-c),[3] essentially contends the district court abused its discretion in finding that Respondents achieved the excellent results which warranted a near lodestar fees award, and the court of appeals failed to subject the district court's findings to a *de novo* "vigilant scrutiny." Cert. Pet. at 11. Petitioners' Reason 1(d) presents the same insubstantial legal issue that warranted only a footnote from the court of appeals (a challenge to some time spent on two individual claims that directly related to plaintiffs' successful class claims).

Petitioners urge an argument that flies in the face of settled law, including the leading precedent from this Court. The legislative history of the Civil Rights Attorneys Fees Award Act, 42 U.S.C. § 1988, was expressly interpreted by this Court in *Hensley*. In that decision, the Court designated *Davis v. County of Los Angeles*, *supra*, a case which is virtually identical to the instant case in

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3. Petitioners' reasons 1(a-c) are essentially Issues I, III, IV, V, and VII, which they raised in the court of appeals; reason 3 was Issue VI in the court of appeals. The Eighth Circuit accurately characterized each of these arguments as raising only factual issues. Reason 1(d) was Issue II in the court of appeals, the only legal ground raised there. Reason 2, of course, was never raised in either the district court or the court of appeals. See note 6, *infra*.

terms of facts and relief obtained, as one of three district court decisions "that 'correctly applied' the twelve [*Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)] factors . . . including 'the amount involved and the results obtained' ". This Court held in *Hensley*:

> In Davis v. County of Los Angeles, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974), *the plaintiffs won an important judgment requiring the Los Angeles County Fire Department to undertake an affirmative action program for hiring minorities.* In awarding attorney's fees the District Court stated:
>
> > 'It also is not legally relevant that plaintiffs' counsel expended a certain limited amount of time pursuing certain issues of fact and law that ultimately did not become litigated issues in the case or upon which plaintiffs ultimately did not prevail. Since plaintiffs prevailed on the merits and achieved excellent results for the represented class, plaintiffs' counsel are entitled to an award of fees for all time reasonably expended in pursuit of the ultimate result achieved in the same manner that an attorney traditionally is compensated by a fee-paying client for all time reasonably expended on a matter.' 8 E.P.D. ¶ 9444, at 5049.
>
> In each of these three cases [Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974), aff'd, 550 F.2d 464 (9th Cir. 1977), rev'd on other grounds, 436 U.S. 547 (1978), Swann v. Charlotte-Mecklenburg Bd. of Ed., 66 F.R.D. 483 (W.D.N.C. 1975), and *Davis v. County of Los Angeles*], *the plaintiffs obtained essentially complete relief.*

461 U.S. at 431 (emphasis added).

Hensley held that plaintiffs who obtain "essentially complete relief" are entitled to a full lodestar fees award without any reduction or downward adjustment. *Hensley* also held, citing *Davis,* that when excellent results have been obtained, "the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." *Id.* at 435. This latter holding confirms the correctness of the Eighth Circuit's resolution of the lone legal issue presented to it by Petitioners, and renewed by them here. Cert. Pet. at 19. The district court properly refused to eliminate hours spent on two individual claims which were inextricably intertwined factually and legally with the successful pattern and practice claim. The Eighth Circuit recognized that Judge Vietor's allowance of these hours was consistent with *Hensley's* recognition that many civil rights cases "will involve a common core of facts". *Id.* at 435. Contrary to Petitioners' assertions, the claims of Williams and Watson were not unsuccessful, rather they were unresolved; the Consent Decree, by assuring their claims were not precluded, afforded them significant relief. (S.App. 289-290, 368-369)

The relief obtained by Respondents *exceeds* the relief in *Davis.* The Consent Decree in the instant case provides affirmative action hiring relief identical to that in *Davis,* requiring that fifty percent of all hires be of qualified blacks until the black percentage of the Des Moines Fire Department equals the black general population percentage,[4] and individual and class remedies and injunctive re-

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4. The key finding by the district court in *Davis* for its conclusion that the litigation achieved "excellent results" stated:

> The class represented by plaintiff has received and is receiving substantial and significant benefits as a result of the commencement of this action and the final judgment herein, which provides that forty percent (40%) of all new firemen

(Continued on following page)

lief not contained in the *Davis* decree.[5] Nonetheless, Petitioners argue that the absence of any damages, back pay or a Revenue Sharing Funds cutoff in the Consent Decree precludes a finding that Respondents obtained excellent results. Cert. Pet. at 18. The plaintiffs in *Davis* lost on their disparate impact challenge to the city's 5'7" minimum height requirement and recovered no back pay or damages. *Davis v. County of Los Angeles,* 8 FEP Cases 239, 241 (C.D. Cal. 1973), aff'd in part, rev'd in part, 566 F.2d 1334 (9th Cir. 1977), vacated, 440 U.S. 625 (1979). As this Court held in *Hensley,* Congress recognized the reality that litigation can achieve excellent results without obtaining every conceivable remedy in the Complaint prayer. 461 U.S. at 435. Nowhere is this reality more obvious than

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Footnote continued—

hired at the County of Los Angeles Fire Department shall be black and Mexican-American until such time as the percentage of blacks and Mexican-Americans in the fire department work force is equal to the percentage of blacks and Mexican-Americans in the County of Los Angeles.

8 E.P.D. ¶ 9444, at 5048.

The Consent Decree in the instant case requires the City "to fill at least fifty percent (50%) of all vacancies with qualified black applicants until the departmental goal of a 6.8% black uniformed work force is met." ¶ 19. (Blacks comprise 6.8% of Des Moines' general population.) ¶ 4(a), A.51. Thus, the interim goal of 50% in the instant case is higher than the 40% goal in *Davis,* while the long-term goal of each decree is identical in that each requires that the interim hiring goals be followed until the minority percentage of the fire department's uniformed personnel equals the minority percentage of the community's general population.

5. The Des Moines Consent Decree contains the general, prophylactic provisions of the *Davis* decree, *Davis v. County of Los Angeles,* 7 E.P.D. ¶ 9088 (C.D. Cal. 1973), and also requires substantial modification of the firefighter application-selection process and provides for extensive individual and class relief. The Des Moines Decree enjoins the City to extend the application period to a minimum of six weeks (compared to two weeks in prior years when the "old boy" word-of-mouth scheme was

(Continued on following page)

in class action cases alleging a pattern and practice of discrimination, as in *Davis* and the instant case. The rare case in which plaintiffs win everything prayed for is undoubtedly the case which *Blum* would find warrants a quality enhancement of the market rate used to calculate the plaintiffs' lodestar.

Petitioners' challenge to the hourly rates awarded and the reasonableness of the hours approved was waived by their failure to submit any evidence to the District Court on these points. *Blum v. Stenson* held the defendant had "waived its right to challenge in this Court the District Court's determination that the number of hours billed were reasonable for cases of similar complexity" because it "failed to submit to the District Court any evidence challenging the accuracy and reasonableness of the hours charged . . ., or the facts asserted in the affidavits submitted

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Footnote continued—

used), ¶ 16, to maintain a record of persons expressing interest in firefighter jobs and to notify them in advance of an application period, and to engage in specified affirmative minority recruitment. ¶ 18. The Decree enjoins the City from use of the personality test except as a pass-fail device (prohibiting its use as a ranking device) and reserves the right to challenge even that limited use of the test should statistics reveal an adverse impact. ¶ 12. The Decree provides hiring relief (with retroactive seniority) for any applicant that would have qualified for certification in any pre-1982 year had the rankings been calculated with the personality test eliminated from the calculation as in 1982. ¶ 21a. The Decree contained relief for a nonapplicants class in the form of an opportunity to compete under the new selection process even though such person was now older than 32. ¶ 21b. Finally, the Decree provided every member of the Plaintiffs' class the opportunity to preserve his or her individual claim by opting out, ¶ 35, and, for those with pending EEOC charges, the opportunity to have an expedited trial of their claims. ¶ 22a.

Plaintiff Dennis Moore qualified pursuant to ¶ 21a and was hired with retroactive seniority to January 1981. Plaintiff Gregory Perry reapplied in 1982 and was hired pursuant to the Consent to Temporary Restraint Order Respondents secured in August 1982.

by respondents' counsel." 104 S.Ct. at 1545 n.5. There is not a scintilla of evidence in the record which would support a challenge to the reasonableness of the hours or the hourly rates awarded by the District Court.

In sum, it was the Petitioners who backed out of negotiations which appeared would bear fruit at a relatively early stage of the litigation. It was the Petitioners who flirted with settlement throughout, but only when Respondents were trial ready did Petitioners agree to settlement. "Most cases are eventually settled, without going to trial, but the tough ones are settled only after the combatants begin to see the 'whites of the eyes' of the opposition." *Willie M. v. Hunt,* 90 F.R.D. 601, 602 (W.D. N.C. 1981), aff'd, 681 F.2d 818 (4th Cir. 1982). Now, Petitioners do not want to pay for the hours it took to successfully litigate a complex class action. They do not want to pay prevailing market rates. They do not like the result which flows from the *Hensley-Blum* equation. However, they are bound by the law and by the facts.

This Court does not grant certiorari to review evidence and discuss specific facts. *United States v. Johnston,* 268 U.S. 220, 227 (1925). This is particularly true in the instant case as the findings of fact made by the district court received the unanimous concurrence of the court of appeals.

> A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.

Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 275 (1949).

2. Petitioners urge that the fees award in this case conflicts with this Court's ruling in *Marek v. Chesny, supra.* Cert. Pet. at 21. Petitioners' belated attempt to raise a Rule 68 defense is foreclosed by its failure to raise the issue in either the district court or the court of appeals. The first mention of Rule 68 in this litigation occurs in the Petition for Writ of Certiorari.[6] In any event, Petitioners clearly failed to make a valid Rule 68 offer of judgment, the final Consent Decree and Stipulation[7] obtained by Respondents was easily more favorable than either of the "offers" made by Petitioners, and the attorney's fee award was based not only on Title VII and § 1988, but also on a statute which does not define the fees award as costs (rendering *Marek* inapplicable).

Examination of the record shows that Petitioners never made a Rule 68 offer of judgment in the instant case, though they purported to make two settlement offers. Neither the February 14, 1983 consent judgment counteroffer, A.30, nor the September 7, 1983 tender of the consent decree approved by the city counsel, A.40, in any way indicate they were subject to Rule 68. Neither men-

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6. Petitioners' first mention of *Marek v. Chesny* did not come until August 2, 1985, in a letter to the Eighth Circuit requesting that *Marek* "be brought to the attention of the Court in its consideration of the petition for rehearing en banc." A.85. Petitioners' letter, which made no mention of Rule 68, was mailed over a month after the Eighth Circuit's June 25, 1985 decision and several weeks after Petitioners filed their petition for rehearing.

7. It is questionable whether Rule 68 has any application in a case settled *prior to trial* by consent decree. In the instant case the Consent Decree expressly provides that plaintiffs are entitled to reasonable attorney's fees, that plaintiffs' counsel do not waive their entitlement to fees, and makes no provision preserving any Rule 68 defense which might be available to defendants. A.81. *Marek* held that plaintiffs "who reject an offer more favorable than what is thereafter recovered *at trial* will not recover attorney's fees for services performed after the offer is rejected." 105 S.Ct. at 3018 (emphasis added).

tions Rule 68. Neither is characterized as an "Offer of Judgment." Neither specifies that it is limited to a 10-day period, within which Respondents must accept or be deemed to have rejected. Instead, the February 14 offer requests "that plaintiffs respond at least no later than one week beyond the close of depositions." A.29. The September tender is completely silent as to any time limitation and none was imposed.

These defects are no minor technicalities as they fully concealed Petitioners' purported intent that the offers were subject to Rule 68. The recipient of a Rule 68 offer is entitled to clear notice and strict compliance with the Rule due to the severe sanction imposed by Rule 68. In addition, the February 14 "offer" was patently defective in that it contained no evidence of authorization. Absent such authorization there is no Rule 68 offer.[8] Rule 68 expressly provides that an offeree, upon acceptance, "may then file the offer and notice of acceptance . . . and thereupon the clerk shall enter judgment."

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8. An "offer of judgment must be unconditional." Moore, 7 *Federal Practice* ¶ 68.04 (2d Ed. 1985); *see also*, Derfner & Wolf, *Court Awarded Attorney Fees*, ¶ 22.02, at 22-4.8 (1985). In contrast to Petitioners' tender of the consent decree *approved by the civil service commission, fire chief, city manager, and city counsel* on September 6, 1983, A.42-A.44, Petitioners' counsel's letter, dated February 14, 1983, attaches no evidence of authority demonstrating it is making a binding unconditional offer. See 1 *Fed. Proc. Forms, L.Ed.* § 1:1686 (1975) (affidavit of authority to make Rule 68 offer). The letter merely states "the various defendants . . . stand ready" to enter into the consent judgment. A.28. The consent judgment which accompanied the letter was not signed by Petitioners' counsel. A.36. Respondents specifically pointed out that Petitioners' counteroffer contained no evidence of authority in their letter rejecting the consent judgment. S.App. 144. That municipal counsel's representation that she has authority, even authority formally voted upon by the city council, is no assurance that the municipality will not renege on the settlement is surely the lesson of the recent Iowa Supreme Court decision in *Dillon v. City of Davenport*, 366 N.W.2d 918 (Ia. 1985).

There is uncertainty "whether Rule 68 applies at all in cases like this which involve complex injunctive remedies rather than easily compared dollar damages." *Garrity v. Sununu*, 752 F.2d 727, 731 (1st Cir. 1984).[9] Even assuming Rule 68 does apply to complex injunctive remedies, plaintiffs are entitled to reject offers whose material provisions are vague and ambiguous without risk of Rule 68 sanction: "The district court was entitled to construe ambiguities in the [defendants' Rule 68] offer against the offeror lest the offeree be pressured into accepting what later turned out to be an unfavorable offer." *Id.* at 733.

Petitioners' consent judgment not only was fatally vague and ambiguous, a point emphasized in Respondents' rejection letter of March 23, 1983 (Ex. 15, S.App. 141-144), it would have provided Respondents with dramatically less relief than they obtained in the final Consent Decree and Stipulation. Indeed, Petitioners' contention to the contrary can hardly be taken seriously, as they notably make no attempt at comparison. Cert. Pet. at 21-22. The final Decree, described by the district court

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9. There also is considerable doubt whether Rule 68 applies in class actions. *Marek* of course was a single plaintiff, private interest damages action. Rule 23(e) provides that a class action cannot be settled without approval by the district court, and that condition creates an irreconcilable conflict with Rule 68. "Rule 68 sets a nondiscretionary 10-day limit on the plaintiff's power of acceptance—a virtually impossible amount of time in many cases to consider the likely merits of complex claims of relief, give notice to class members, and secure the court's approval." *Marek, supra*, at 3030 n.49 (Brennan, dissent). Further, what if a Rule 68 offer is acceptable to the named plaintiffs but is disapproved by the court, and the final judgment is less favorable than the offer. "To impose liability for costs on the plaintiff in that case would be ludicrous, yet required by the literal terms of Rule 68." *Gay v. Waiters' & Dairy Lunchmen's Union*, 86 F.R.D. 500, 503 n.8 (N.D.Cal. 1980). Indeed, the Rule 23(e) requirement of judicial approval necessarily conditions the Rule 68 offer, yet a Rule 68 offer must be unconditional.

as "a very professional work product reflecting a high level of skill in the field of complex civil rights litigation", A.10, is far better in every area, both in terms of the substantive relief mandated and the procedural and prophylactic safeguards built into the Decree to ensure the substantive relief would actually be attained.

Throughout their Petition, Petitioners assert their willingness at all times to agree to affirmative action hiring relief, which is the reasoning behind their claim that no "uncontested" relief was obtained. Comparison of the affirmative action hiring provisions of the proposed consent judgment with those of the final Consent Decree demonstrates the superficiality of Petitioners' contention. Although the interim hiring goals of the two decrees are the same (one-for-one), the long-term mandate of the final Consent Decree is decidedly more favorable to the plaintiffs' class than that in the consent judgment. The final Decree will ensure that at least twenty-one qualified blacks will achieve permanent firefighter positions (in contrast to eight under the rejected proposal).[10] Measured

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10. Although ¶ 4-5 of Petitioners' consent judgment (CJ) mandates one-for-one affirmative action hiring, the obligation ends once "the proportional black participation is achieved in the entry level firefighter positions". In contrast, ¶ 19-20 of the Decree specifies that one-for-one hiring shall continue until blacks comprise 6.8% of all "uniformed job classifications". A.64. This represents the best long-term goal plaintiffs could achieve. Blacks comprise 6.8% of Des Moines' general population, but only 5.7% of its work force; blacks are only 4.1% of the Des Moines SMSA general population, and even less of the SMSA work force. CJ ¶ 10 provides for continuing jurisdiction until the black percentage of the DMFD work force is "commensurate with the black presence in the work force at large", which suggests Petitioners intended the lower *work force* percentage (5.7% or the lower SMSA percentage) to apply to its ¶ 4 hiring obligation as well. In addition, the CJ hiring mandate would have concluded once the relevant black percentage was achieved "in the entry level firefighter positions", which number

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by the yardstick suggested by Petitioners, the final Decree will result in at least thirteen more black firefighters than under Petitioners' proposal, a result two-and-a-half times more favorable to the plaintiffs' class than the offer. All other elements of the final Decree's remedies, individual and class relief, injunctive relief, and fees, are more favorable as well.[11]

Footnote continued—

only 144. App. 42. In contrast, the final Decree's 6.8% long-term goal concludes only when 6.8% of all 311 *uniformed* fire department positions are filled. A.51. In sum, the final Consent Decree mandates affirmative action hiring until there are at least 21 black firefighters (.068 x 311), whereas the CJ would only have ensured eight black firefighters (.057 x 144).

Two other features of the final Decree further enhance its affirmative action hiring provisions. The final Decree only counts those who achieve nonprobationary firefighter status as "hires", while the CJ is silent. Finally, in contrast to ¶ 4-5 of the Decree, which extensively summarizes the statistical evidence, the CJ contains no evidentiary basis for a finding of a pattern and practice of discrimination, which is vital to both obtaining court approval of the Decree and to protecting the Decree against collateral attack.

11. Although CJ ¶ 8 provides for individual hiring relief for the same plaintiffs' subclass as does ¶ 21a of the Decree, ¶ 21a also affords those individuals retroactive seniority. Furthermore, ¶ 22 and ¶ 35 of the Decree provide that any dissatisfied class member can opt out of the settlement as of right, in contrast to CJ ¶ 12 which waives all individual claims against Petitioners' 1982 selection process. Finally, ¶ 21b of the Decree provides a nonapplicants class with a right to be considered under the new nondiscriminatory selection process, regardless of age; there is no comparable provision in the CJ.

The CJ contains no injunctive relief at all as to the application-selection process. Paragraph 22 of the Decree mandates Petitioners to continue to use the modified 1982 selection process procedures, qualifications and selection criteria, and ¶ 15 prohibits Petitioners from any modification of the process or selection criteria without approval of Respondents or the court. Paragraph 12 enjoins Petitioners from any use of the personality test as a ranking device and reserves the right to challenge its use even on a pass/fail basis. Paragraph 16 mandates that the application period shall not be shorter than six weeks. Paragraph 2 contains important injunctive protection against obstruction

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Respondents did not reject the September 7, 1983 consent decree tendered to the district court. Except for numerous notices (to both Plaintiffs' class and the various subclasses entitled to relief) written and negotiated thereafter, Petitioners' September 7, 1983 consent decree tender is the final Consent Decree which was jointly proposed to the district court in December 1983. However, in addition to the Consent Decree and attached notices, the parties also submitted to the court a Stipulation of the Parties which became part of the final judgment. *See*, Resp. A.1. Whether the Stipulation be characterized as additional substantive relief, as procedural or prophylactic relief, or an important clarification of certain latent ambiguities in ¶ 19-20 of the Consent Decree, the final judgment was more favorable to Respondents because of it. The internal Plaintiffs' class conflict concerned whether ¶ 19-20 adequately protected against the hiring of less qualified blacks intending to flunk them out during drill school. Had Respondents been unable to obtain the Stipulation, that conflict threatened to result in objections from the NAACP and other class members,[12] which might

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Footnote continued—

of decree enforcement and against retaliation. Although CJ ¶ 1 mandates affirmative action recruitment, it leaves the details to an exhibit which was never provided, A.32; in contrast, a comprehensive affirmative recruitment obligation is mandated by ¶ 17-18 of the Decree.

CJ ¶ 11 provided Plaintiffs with attorney fees "at the hourly rate charged to the NAACP" (which Petitioners knew was zero, as Respondents' counsel's compensation was contingent upon fees being awarded by the court); in contrast, ¶ 32-33 of the Decree provide for payment of all expenses and disbursements and "reasonable attorneys' fees" (at market rates), with provision for fees not only through entry of the Decree but also "for the work done implementing" its remedial provisions.

12. The Consent Decree's primary disincentives against such misconduct are contained in two ¶ 19 provisions. The first man-

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have precluded district court approval of the Consent Decree, and almost certainly would have led to an appeal if approved. Judge Vietor praised Respondents' counsel for their work in speedily and harmoniously resolving the class conflict:

> Lack of plaintiff class unity in this type of civil rights litigation is natural and common, and a fundamental part of the duties of counsel for the plaintiffs is to

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Footnote continued—

dates that the one-for-one hiring relief will continue until the long-term 6.8% goal "has been achieved and maintained for a period of one (1) year"; the second states that "[f]or purposes of determining compliance with the interim and long-term goals, persons who fail to complete probation shall not be counted as having been appointed." Both ensure that *long-term* goal performance will be measured in permanent jobs rather than mere appointments. The Stipulation completes the shield by constructing additional disincentives against any abuse of the *interim* goal.

Stipulation ¶ 3 makes clear that at least 50% of all annual vacancies must be filled by black applicants, but, more importantly, ¶ 4 further requires that blacks constitute at least 50% of "all net appointments made during the year." Net appointments are to be calculated "by deducting from the list of appointments all persons who, for whatever reasons, left the firefighting positions because of failure to complete their probationary year." Paragraph 5 provides "that cumulative black appointments [shall] constitute at least fifty (50) percent of all net appointments at the end of every reporting period during the life of the Consent Decree", making clear that should there be a shortfall of net black appointments one year, compliance with the Decree would not be achieved by appointing on a one-for-one basis the following year. Resp. A.2.

Should a shortfall in cumulative black appointments occur, ¶ 6 requires the City to "make application to the Court for direction before any further vacancies are filled or appointments are made or new selection process is started". The Stipulation imposes an obligation on Petitioners to take affirmative action, if necessary, so that blacks constitute at least fifty percent of those achieving nonprobationary status on an annual basis—and on a cumulative basis—throughout the life of the Decree. Should these *interim* goals not be achieved, ¶ 6 establishes the mechanism by which the court could order compensatory black appointments. Resp. A.3.

work with the class to achieve the unity requisite to a fair conclusion to the case. A.10.

No Rule 68 defense was raised in either court below. "It is only in exceptional cases coming here from the federal courts that questions not presented or passed upon below are reviewed." *Duignan v. United States,* 274 U.S. 195, 200 (1927). No exceptional circumstance exists which warrants allowing Petitioners to raise a Rule 68 issue for the first time before this Court.[13]

At most, Rule 68 would only bar Respondents' recovery of post-offer *traditional* costs (court fees, printing expenses, etc.) and would not affect their recovery of post-offer attorney fees. Judge Vietor's award of attorney's fees was based not only on the fees-shift provisions of Title VII and § 1988, but also on "other applicable civil rights fee-shifting statutes." A.7. Although the district court did not enumerate those other statutes, the Consent Decree does. A.45-A.46. One of the other civil rights fees-shift statutes is the State and Local Fiscal Assistance Act of 1972 ("Revenue Sharing Act"), whose provisions fully and independently authorize the substantive relief incorporated in the Consent Decree.[14]

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13. Assuming *arguendo* that a decision overruling settled Supreme Court precedent might constitute an exceptional circumstance, *Marek* is not such a case. *Marek* did not represent a change in the law so much as a clarification. It did not overrule any prior precedents of this Court. The lower courts were split with regard to the Rule 68 issue resolved in *Marek,* but that is not exceptional. This Court granted certiorari in *Marek* on April 23, 1984, *see* 104 S.Ct. 2149, nearly two-and-a-half months prior to the evidentiary hearing on fees in the instant case on July 6, 1984. The District Court decision in *Marek,* whose rationale this Court followed, came down on September 3, 1982, nearly a year-and-a-half before Respondents filed their application for fees. 547 F.Supp. 542 (N.D.Ill. 1982).

14. 31 U.S.C. § 6716(a) provides in part: "No person in the United States shall be . . . subject to discrimination under,

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The Revenue Sharing Act is an independent source of jurisdiction in this case, as Petitioners acknowledge at page 6 of their Petition. See also, A.46. The Revenue Sharing Act authorizes the district court to "allow a prevailing party (except the United States Government) a reasonable attorney's fee." 31 U.S.C. § 6721(c)(2); *supra* at 1. Rule 68, as interpreted by *Marek,* only impacts on attorneys' fees awards when the underlying fee-shift statute defines "costs" to include attorney's fees. Since the Revenue Sharing Act is an independent basis for the entire fees award in this case, and since it does not define fees "as costs", any Rule 68 sanction in the instant case would have no effect on the district court's attorneys' fees award.

3. Petitioners state that the court of appeals erred in affirming the district court's award of $15,237 in fees to special counsel, Conlin and James, for their prosecution of Respondents' fee application. Again, Petitioners raise a factual issue subject to reversal only for abuse of discretion. The Eighth Circuit properly held that the district court did not abuse its discretion when it concluded the amount of Respondents' fee request was reasonable and that it was appropriate for them to retain counsel to litigate their fee application.

Footnote continued—

a program or activity of a . . . unit of general local government because of race, color . . . when the government receives a payment under this chapter." Section 6721(a) authorizes a private cause of action when, as in the instant case, an administrative complaint has been filed with the Secretary of the Treasury and administrative remedies have been exhausted. The court may grant injunctive relief, including affirmative action hiring relief, attorney's fees, and can order suspension or repayment of Revenue Sharing monies. *Id.* at § 6721(c). *See, United States v. City of Chicago,* 549 F.2d 415 (7th Cir.), cert. denied, 434 U.S. 875 (1977).

The law is settled that plaintiffs are entitled to recover attorney's fees for the work done to establish their attorney's fees for work on the merits of the litigation. *E.g., Jones v. MacMillan Bloedel Containers, Inc.*, 685 F.2d 236, 239 (8th Cir. 1982). As noted above, at 10, *Stanford Daily v. Zurcher, supra,* was one of the decisions specifically designated by the Fees Act legislative history as correctly calculating a "reasonable" attorney's fee. *Hensley,* 461 U.S. at 430 n.4. *Zurcher* awarded fees for the legal work done on the fees litigation, holding that to disallow such fees "would allow parties to dilute the value of a fees award by forcing attorneys into extensive, uncompensated litigation in order to gain any fees." 64 F.R.D. at 684.

Hensley and *Blum* make clear that the burden of proof on attorney's fees claims rests with the plaintiffs. It matters not that additional attorneys were brought in on the fees litigation at the district court, as the work had to be done by someone. *Tasby v. Estes,* 651 F.2d 287, 289 (5th Cir. 1981). Retention of counsel was especially appropriate due to the necessity of testimony by Respondents' counsel, Lovell and Biehler. Petitioners also retained outside counsel to represent them at the fees hearing.

Respondents' initial fees application requested an enhancement of 1.75, which was consistent with existing case law when filed on February 17, 1984. *E.g., Jorstad v. IDS Realty Trust,* 643 F.2d 1305 (8th Cir. 1981) (1.5 enhancement, total fees of $1,019,634); *Rajender v. Univ. of Minnesota,* 546 F. Supp 158 (D. Minn. 1982) (2.0 enhancement, total fees of $1,955,000). On March 21, 1984, this Court decided *Blum v. Stenson,* in which it held that quality enhancements were available only in the "rare" case, 104 S.Ct. at 1548, and left uncertain whether contingency enhancements were available at all. *Id.* at 1550.

As a result of this change in the law, Respondents reduced their requested enhancement to .75. Even *Lund v. Affleck*, 587 F.2d 75 (1st Cir. 1978), relied upon by Petitioners, recognizes that the fact the original fees request required revision due to new case law in no way implied that the initial request was not filed in good faith. *Id.* at 77 n.3.

The fees claim of James and Conlin was modest, and no claim for work on the fees litigation was made by any of the Respondents' other counsel at the trial level. Respondents were awarded $167,794 in fees for work on the merits, which is nearly 96% of their requested merits lodestar. In light of these results, the district court did not abuse its discretion in awarding $15,237 in fees and $1,869.40 in expenses to James and Conlin.

CONCLUSION

No substantial issues warranting further briefing or oral argument have been raised by Petitioners. The writ of certiorari should be denied.

Dated: December 13, 1985.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
Southern District of Iowa
Central Division

Civil No. 82-460-D

DENNIS A. MOORE, et al.,
Plaintiffs,

vs.

CITY OF DES MOINES, IOWA, et al.,
Defendants.

STIPULATION OF THE PARTIES

COMES NOW the Plaintiffs, named and class, and the Defendants City of Des Moines, Iowa and the Civil Service Commission of the City of Des Moines, Iowa (hereinafter the City and the Commission) and file with the Court the following STIPULATION OF THE PARTIES concerning the implementation of the Consent Decree:

1) that, as more fully set out in Paragraph 19 of the Consent Decree, the City's interim goal is to fill at least fifty (50) percent of all vacancies for the entry level uniformed position of firefighter with qualified black applicants; and that this filling of all such vacancies with at

least fifty (50) percent qualified black applicants is and shall remain the result intended by plaintiffs and defendants in all hiring actions undertaken pursuant to this Consent Decree for so long as the Court retains jurisdiction in this action;

2) that, as set out in said Paragraph 19, the City shall not, in making its annual compliance report, count any person as appointed who failed to complete probation during the year for which the report is made;

3) that the City's compliance with this interim goal shall be measured as set out in said Paragraph 19 on an annual basis from the date of the Consent Decree by tallying all vacancies filled during the year and ascertaining and reporting whether at least 50% of all such vacancies have been filled by appointment of qualified black applicants;

4) that the measurement of the City's compliance under Paragraph 19 shall be determined from the information contained in such annual report, which shall inform the Court therein of all net appointments made during the year, which shall be ascertained by deducting from the list of appointments all persons who, for whatever reason, left the firefighting positions because of failure to complete their probationary period during the year under review, and reporting which of such appointments were of qualified black candidates and whether fifty (50) percent of the net appointments made during the year were of qualified black candidates;

5) that the intent of the parties is to assure that cumulative black appointments constitute at least fifty (50) percent of all net appointments at the end of every reporting period during the life of the Consent Decree;

6) that, if at the end of such reporting year, for whatever reason, fewer than fifty (50) percent of either all vacancies filled or all net appointments made have been of qualified black candidates, the City shall make application to the Court for direction before any further vacancies are filled or appointments are made or new selection process is started;

7) that, upon the exhaustion of the original and reserve list, and pursuant to paragraph 26 of the Consent Decree, the City shall immediately provide a report to the plaintiffs supplying all information necessary to determine the net cumulative appointments of blacks and non-blacks during the life of the Consent Decree;

8) that, in the event a person leaves drill school or fails otherwise to satisfactorily complete his/her probationary period, the City, in keeping with its practice during the 1982 Selection Process, shall deem that person as not having been appointed and shall utilize the provisions of Paragraph 20(d) in making the next appointment from the sublist or the reserve sublist;

9) that, when any black appointee leaves drill school or fails to otherwise satisfactorily complete the probationary period, the City shall immediately file with the Court a full report of the facts known to the City or its employees which pertain to such action, sufficient to provide to the Court and to Plaintiffs' counsel a full opportunity to review and, if deemed proper, to make appropriate response to such action; and

10) that, to the extent the parties differ as to the interpretation of the language and/or intent of the Consent Decree, as herein clarified, each such difference shall be presented to and resolved by the Court before implementa-

tion of such interpretation or as soon as such difference is known, whichever is earlier.

/s/ Thomas I. Atkins
Thomas I. Atkins
General Counsel of the NAACP
ATTORNEY FOR PLAINTIFF NAACP

/s/ Russell E. Lovell II
Russell E. Lovell II
/s/ Gregory L. Biehler
Gregory L. Biehler
/s/ Robert A. Wright, Sr.
Robert A. Wright
ATTORNEYS FOR PLAINTIFFS

/s/ Philip T. Riley
Philip T. Riley
Corporation Counsel
/s/ Nelda Barrow Mickle
Nelda Barrow Mickle
City Solicitor
ATTORNEYS FOR DEFENDANTS